

Supreme Court, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. **75-1004**

GUADALUPE JIMENEZ, *et al.*,

Appellants,

—v.—

HIDALGO COUNTY WATER IMPROVEMENT DISTRICT No. 2, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

GUADALUPE JIMENEZ, et al.,

Appellants

. V.

HIDALGO COUNTY WATER
IMPROVEMENT DISTRICT NO. 2,
et al.,

Appellees.

On Appeal from The
United States District Court for the
Southern District of Texas

JURISDICTIONAL STATEMENT

This appeal is taken from the judgment of a three-judge panel of the United States District Court for the Southern District of Texas, specially constituted pursuant to the provisions of Title 28, United States Code section 2284, which judgment dismissed Appellants' claim that the exclusion of their communities from the defendant water districts denied them

equal protection and due process of law. This statement is submitted to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the three-judge district court, filed October 2, 1975, is presently unreported. A copy of that opinion is attached to this Jurisdictional Statement at Page 1a of the Appendix. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 496 F.2d 113 (5th Cir. 1974), and a copy of that opinion is also located in the Appendix at Page 24a. The original opinion of the single-judge district court, dismissing this cause without convening a three-judge court, is also unreported and is printed in the Appendix at Page 35a.

JURISDICTION

This civil action for injunctive and declaratory relief was brought by Appellants under the authority of Title 42, United States Code section 1983, and of the Fifth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction was predicated upon Title 28, United States Code sections 1331, 1343, 2201 and 2202. Appellants asked the District Court to declare that Article 8280-3.2 of Vernon's Annotated Texas Civil Statutes was in violation of the United States Constitution and to enjoin the defendant water district directors from enforcing such provision.

By memorandum and order filed on August 15, 1973, a single-judge district court dismissed Appellants' suit and its companion case, Juan Fonseca v. Hidalgo County Water Improvement District No. 2, No. 72-B-180 (S.D. Tex.). The United States Court of Appeals for the Fifth Circuit, by judgment entered on June 17, 1974, reversed both decisions and remanded for consideration by a three-judge panel. The final judgment of the district court composed of three judges was filed and entered on October 2, 1975. A copy of the judgment from which this appeal is taken is located in the Appendix at Page 58a. Notice of appeal to this Court was filed in the District Court on November 19, 1975, a copy of which is included in the Appendix at Page 60a.

The jurisdiction of the three-judge district court was established pursuant to the provisions of Title 28, United States Code sections 2281 and 2284. The jurisdiction of this Court to review the decision of such a specially constituted district court by direct appeal is conferred by Title 28, United States Code sections 1253 and 2101(b).

STATE STATUTE INVOLVED

Article 8280-3.2, Vernon's Annotated Texas Civil Statutes:

Art. 8280-3.2 Water control improvement districts; exclusion of urban property
Section 1. As used in this Act:

(a) "Urban property" means land which has been subdivided into town lots, or town lots and blocks, or small parcels of the same general nature of town lots, or town blocks and lots, designed, intended or suitable for residential or other non-agricultural purposes, as distinguished from farm acreage, including streets, alleys, parkways, parks and railroad property and rights-of-way in such subdivision; whether such subdivision be within or near any established city, town or village, or not; and whether or not a plat or map of such subdivision has been duly filed for record and recorded in the office of the county clerk of the county in which such subdivision or any part thereof is situated. Urban property shall not be deemed to include land, which is or has been within one year previous to the date of the hearing hereinafter provided, used for farming or agricultural purposes.

(b) "District" means any water control and improvement district now existing or hereafter created for the principal purpose of, or principally engaged in, furnishing water for the irrigation of agricultural lands and having no outstanding bonded indebtedness owing by such water control and improvement district at the time of the hearing hereinafter provided, or having indebtedness only in connection with a loan from an agency of the United States, provided written

consent from an authorized representative of the agency of the United States involved to the proposed exclusion hereunder is on file with the district prior to the time of the hearing hereinafter provided.

Sec. 2. Urban property located within the boundaries of a district may be excluded from such district by the Board of Directors after a hearing by the Board of Directors called and held as hereinafter set forth.

Sec. 3. The Board of Directors of a district may by majority vote adopt a resolution calling a hearing to determine whether or not all or any part or parts of any urban property shall be excluded from the district. The resolution adopted by the Board of Directors shall describe the urban property proposed for exclusion by metes and bounds, by lots, blocks and subdivision or by other legal description so as to definitely identify the same, and such resolution shall set forth the purpose of the hearing as well as the date, time and place at which such hearing shall be had.

Sec. 4. It shall be the duty of the Board of Directors to cause notice of such hearing to be given by posting a true copy of the resolution referred to in the preceding section at the courthouse door of the county in which such district or any portion thereof is situated, at a location in or near the urban property proposed for exclusion,

and also in a conspicuous place in the principal office of the district for at least three (3) weeks before the date of such hearing. The date, time, place and purpose of such hearing shall also be advertised by publishing notice thereof one time in one or more newspapers giving general circulation in the district, such publication to be at least ten (10) days prior to the date of hearing. In the event railroad right-of-way is involved herein, notice shall be given to the railroad company by mailing, first class, a true copy of the same, properly addressed to the offices of the railroad at the address as it appears on the last approved county tax roll.

Sec. 5. If, as a result of such hearing, which may be continued from day to day, and from time to time until all persons entitled to be heard and who appear at said hearing have had an opportunity to be so heard and offer evidence, the said Board of Directors shall determine and find (a) that the owners of a majority in acreage of such urban property do not desire irrigation of the same; or

(b) that such urban property is not used or intended to be used for agricultural purposes; and

(c) that it would be to the best interest of said district and of the urban property proposed to be excluded or any part or parts thereof, that it be excluded from the district, said Board of Directors shall adopt a resolution setting forth such determina-

tion and findings and excluding the urban property or such part or parts thereof as to which such determination and findings are made. Should any canals, ditches, pipelines, pumps or other facilities of the district be located upon lands excluded in the resolution of the Board of Directors, such exclusion shall not affect nor interfere with any rights which the district might have to maintain and continue operation of the facilities as located for the purpose of servicing lands remaining in the district. A copy of said resolution excluding urban property from the district certified to and acknowledged by the Secretary of the Board of Directors shall be recorded by the district in the Deed Records in the county in which the excluded property is situated as evidence of such exclusion.

Sec. 6. From and after the adoption of a resolution by the Board of Directors excluding urban property the excluded property shall constitute no part of such district and shall have no further liability thereafter to said district for taxes, assessments or other charges of the district, but any taxes, assessments or other charges owing to the district at the time of exclusion shall remain the obligation of the landowner and shall continue to be secured by any and all statutory liens, if any.

Acts 1971, 62nd Leg., p. 814, ch. 86, eff. Aug. 30, 1971.

QUESTIONS PRESENTED

1. Whether the plaintiffs and the class they represent were denied due process of law in the exclusion of their property from the defendant districts without reasonable and adequate notice of their right to be heard on an issue of substantial and direct interest?

2. Whether the exclusion of plaintiffs' communities from the districts for impermissible political motives denied plaintiffs the equal protection of the law?

3. Whether by singling out railroads as a favored class of landowner entitled to actual notice of a proposed exclusion of realty, Article 8280-3.2, V.A.T.C.S., denied to all other landowners, such as plaintiffs and their class, the equal protection of law?

STATEMENT OF THE CASE

Appellants are residents of rural, unincorporated slum communities, known in Spanish as "colonias." Almost 100 such communities exist at the southern tip of Texas. The colonias residents are seeking to retain a voice in the policy-making processes of two local governmental units--water control and improvement districts organized under Chapter 51 of the Texas Water Code. Water control and improvement districts, or WCID's, are general purpose water districts having broad powers to provide a variety of municipal services needed by the plain-

tiffs' communities, including a safe domestic water supply, sewer and sanitation services, and drainage.

The fourteen named plaintiffs residing in nine separate colonias complain that they were denied the right to vote in water district elections by virtue of the exclusion of their communities from the two districts, residence being a qualification for exercise of the franchise. After the residents had been afforded the constructive notice contemplated by the statute in question, Article 8280-3.2, Vernon's Annotated Texas Civil Statutes, the board of directors of each district convened a hearing to determine whether the district and the properties being excluded would be benefited by the exclusion. On October 28, 1971 the Board of Directors of Hidalgo County Water Improvement District No. 2 ordered the exclusion of thirty-six rural subdivisions. Forty tracts were excluded by order of the Hidalgo and Cameron Counties Water Control and Improvement District No. 9 on September 6, 1972. The plaintiffs in the court below challenged the exclusion statute on three grounds: (1) that providing only constructive notice under the existing circumstances denied Appellants due process of law, (2) that the defendant district directors denied Appellants equal protection of the law by fencing them out of the electorate for impermissible political motives, and (3) that by providing only railroad companies with actual notice of the proposed exclusions, Article 8280-3.2 denies all other property holders equal protection of law.

On December 16, 1972 the complaint was filed by the named plaintiffs on behalf of themselves and a class composed of "all those persons whose lands were excluded from the Defendant Water Districts without actual personal notice to the owners or persons in possession of such lands and who do not want their lands excluded from the Defendant Water Districts." The Appellants were seeking to have their communities reinstated in the districts prior to the elections for district directors scheduled for January 9, 1973. However, the district court, shortly prior to the elections in question, denied Appellants' request for a preliminary injunction, requested the parties to stipulate the evidence insofar as possible, and established an expedited briefing schedule.

Shortly after the present suit was filed, Juan Fonseca and Efren Ramirez filed applications to have their names printed on the ballot as candidates for directors of Hidalgo County Water Improvement District No. 2. Fonseca and Ramirez were seeking to represent the interests of those residents who wanted the districts to provide municipal services as well as irrigation services. Their applications were rejected by the defendant directors on the ground that the candidates did not own land in the district subject to taxation, as required by the Texas Water Code, and another suit was filed against District No. 2 challenging the constitutionality of that provision of the Water Code. Fonseca v. Hidalgo County Water Improvement District No. 2, C.A. No. 72-B-180 (S.D. Tex.). By

agreement, the stipulations filed in the companion Fonseca case were also submitted in proof of the claims and defenses in the Jimenez suit. The district court, sitting as a single judge, filed its original Memorandum And Order on August 15, 1973, consolidating the two cases and dismissing both on the merits.

Appeals were taken by the plaintiffs in both cases, and the United States Court of Appeals for the Fifth Circuit ordered both remanded for consideration by a three-judge court, holding that the appellants' claims presented substantial federal constitutional questions. Jimenez v. Hidalgo County Water Improvement District No. 2, 496 F.2d 113 (5th Cir. 1974); Fonseca v. Hidalgo County Water Improvement District No. 2, 496 F.2d 109 (5th Cir. 1974). The opinions in both cases were filed on June 17, 1974.

Upon remand, the parties filed amended pleadings and additional stipulations of fact. Plaintiffs' Second Amended Complaint, filed on September 25, 1974, added a new cause of action, alleging that plaintiffs had been unconstitutionally "fenced out" of the district electorates because of the defendant directors' fears as to how they might vote in future general and bond elections. Oral arguments were heard before the Three-Judge Court on July 14, 1975, and the opinion and final judgment of the three-judge panel was filed on October 2, 1975. Essentially, the district court held (1) that there was no constitutional impediment to fencing the colonias residents out of the districts because of the

defendants' fears that they would vote against the interests of agricultural users of water, (2) that notice to the colonias residents by posting and publication was all that was constitutionally required of the districts prior to excluding the communities, and (3) that strong justification exists for providing railroads actual notice of the exclusions while providing all others only constructive notice. Appellants filed their notice of appeal to this Court on November 19, 1975.

THE QUESTIONS ARE SUBSTANTIAL

I. Plenary Review Of The District Court Decision Is Necessary To Settle Important Issues Of Federal Law Which Have Heretofore Not Been Resolved By This Court.

Most of America's migrant farm laborers live in South Texas; many make their homes in the "colonias" that dot the landscape in the Lower Rio Grande Valley. A typical colonia consists of a cluster of dilapidated, substandard two or three-room frame houses along an unpaved, rutted road. A typical water supply is a shallow, salty well, which frequently lies all too close to the sanitary system--an outhouse. Naturally, many of the wells are contaminated with human feces. Some residents draw their drinking water directly from the irriga-

tion canals that crisscross the area, even though the water is in a raw, untreated, and oftentimes polluted condition. Others are forced to transport their domestic water supply in makeshift carts, wagons and barrels from a safe municipal source. Not surprisingly, the two Valley counties of Hidalgo and Cameron, with only 3.03% of the Texas population, had 81.3% of the reported cases of amebiasis in 1971 and 68.1% of the cases of polio.

Holding the vast water resources of the region in trust for the people of the area are the water control and improvement districts that blanket the Valley. Water control and improvement districts, or WCIDs, organized under Article 16, Section 59 of the Texas Constitution and operating under Chapter 51 of the Texas Water Code (1972), have the power and authority to own, finance, construct, operate and maintain facilities for the treatment and distribution of water for domestic use, and have like powers to provide sewage, sanitation, and drainage facilities. However, neither of the Appellee districts have ever afforded any of the residents of their districts such services, preferring instead to devote virtually all of their resources to operating and maintaining an irrigation system. The residents of the colonias want the defendant WCIDs to exercise such of their statutory powers as will respond to their needs for water and sanitation services.

Rather than responding to those needs, the defendant directors have re-

sorted to a crude, but effective, method of frustrating the desires of the would-be municipal water users. Article 8280-3.2, V.A.T.C.S. was adopted by the Texas Legislature in 1971 at the behest of the Rio Grande Valley water district directors. The statute provides the directors a streamlined method for ridding themselves of the unwanted colonias by simply reading them out of the body politic. With no right of appeal available to the excluded residents, their interests are completely at the mercy of the incumbent directors.

The Appellees' exclusion mechanism raises several important federal constitutional issues that have not yet been decided by this Court. First, this Court has never decided whether the Due Process Clause requires actual notice to residents of a local political subdivision who the governing body propose to exclude from that subdivision. Secondly, the Court has not decided whether the directors of a political subdivision may, consistent with the Due Process Clause, exclude those whose political interests they perceive to be adverse.

The proliferation of local political subdivisions raises both of these heretofore undecided issues to a level of major national significance. Cities, counties, and school districts have been joined by a confusing milieu of municipal utility districts, fresh water supply districts, navigation districts, hospital districts, sanitation districts, watershed improvement districts, soil conservation districts, road districts, and water control

and improvement districts, seemingly ad infinitum. What has been created is a layer of virtually invisible government, a level of government that is sorely lacking in accountability to the citizenry it is to serve. The underlying theme of the present litigation is the accountability of this invisible government to its constituency. Sustaining Appellants' due process and equal protection claims would significantly advance that goal of accountability.

A. Appellants Were Denied Due Process Of Law In The Exclusion Of Their Property From The Water Districts Without Reasonable And Adequate Notice Of Their Rights To Be Heard On An Issue Of Substantial And Direct Interest.

Article 6, Section 2 of the Texas Constitution establishes as a qualification for voting in Texas elections, including those conducted by water districts, that the voter reside in the district in which he intends to vote. Therefore, when the Appellants' communities were neatly excised from the corporate territory of the districts, they were automatically denied the right to vote in district elections. It is for the redress of that loss of voting rights that the colonias residents appeal to this Court for due process protection.

One of the most pervasively articulated themes in modern Supreme Court jurisprudence has been the safeguarding of the structure of the political process. Striking down both practices that dilute the vote, Reynolds v. Sims, 377 U.S. 533 (1964); and Baker v. Carr, 369 U.S. 186 (1962); and those that result in the outright denial of the franchise, Carrington v. Rash, 380 U.S. 89 (1964); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969); City of Phoenix v. Kolodziejewski, 399 U.S. 204 (1970); Dunn v. Blumstein, 405 U.S. 330 (1972); Hill v. Stone, ___ U.S. ___, 44 L.Ed.2d 172 (1975), this Court has remained steadfast in its determination to protect the franchise, the fundamental political right that is "preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, at 370 (1886).

The foregoing decisions were based upon Equal Protection claims; the Due Process Clause has only rarely been invoked in protection of voting rights. Nevertheless, this Court has sanctioned due process challenges to infringements upon the right to vote. In United States v. State of Texas, 252 F.Supp. 234 (W.D. Tex. 1966), aff'd, 384 U.S. 155 (1966), a 3-judge district court voided the Texas poll tax on due process grounds, stating that "it cannot be doubted that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the Due Process Clause." 252 F.Supp. 234, at 250. Appellants submit that their plight is another of those uncommon circumstances where the

Due Process Clause affords protection for their right to vote.

The fundamental error of the district court in its treatment of the due process question was its failure to recognize the distinction between annexation, consolidation, and similar boundary changes, on the one hand, and the exclusion situation confronting Appellants, on the other. Citing Falbrook Irrigation District v. Bradley, 164 U.S. 112 (1896) and Chesebro v. Los Angeles County Flood Control District, 306 U.S. 459 (1939), the lower court did not recognize the loss of Appellants' political rights as a "loss of constitutional dimensions." Opinion of the Three-Judge District Court, Page 17a. In the cited cases political rights were being created, not destroyed. That circumstance contrasts sharply with the present litigation. Since 1920 in the case of one of the Appellee districts and 1928 in the case of the other, Appellants had been vested with the right to vote and to participate in the political affairs of the districts; those rights were divested when Appellants were excluded from the districts. It is that divestiture of rights without adequate notice and an opportunity to be heard that plaintiffs protest. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970); Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

Strong policy factors existing in the exclusion situation demand different procedural standards for the protection of those being excluded. Claims similar to plaintiffs' were raised four years ago

in Thompson v. Whitley, 344 F. Supp. 480 (E.D. N. Car. 1972, 3-judge ct.), where landowners were protesting on equal protection grounds the annexation of their property to a city without allowing them the right to vote on the annexation. In deciding not to impose the strict "compelling state interest" standard of review, the Court noted as follows:

Indeed, the newly annexed citizens brought into the township over their protest may thereafter vote in township elections and have their votes counted fully to influence township decisions--including future annexations and perhaps even de-annexation. *Id.*, at 484.

The distinction between annexation and exclusion is starkly clear when the Jimenez case is compared to Thompson. The plaintiffs here do not have the usual political remedy available to those who have been unwillingly annexed. The colonias residents have no power now over those who made the decision to exclude them. If for no other reason, the balancing of interests dictates the necessity of providing the residents in the excluded areas a real--not a sham--opportunity to be heard.

Once it is determined that due process requires notice and a fair hearing prior to exclusion, the question then becomes the quantum of notice to be afforded. The answer to that question has already been provided in the leading case of Mul-lane v. Central Hanover Bank & Trust

Company, 339 U.S. 306 (1950):

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections ... The notice must be of such nature as reasonably to convey the required information....
339 U.S. 306, at 315.

A case strikingly similar to the present litigation was before the Court in 1962. Schroeder v. City of New York, 371 U.S. 208 (1962). The City of New York, prior to diverting part of the flow of the Neversink River, provided notice to the property owners along the river by posting and by publication in two newspapers. That notice was found to be insufficient to bar a property owner's claim for damages for impairment of the use of the river for bathing, swimming, fishing, and boating, an impairment that resulted from a decrease in the velocity of flow of the river. Whereas Mrs. Schroeder invoked the Due Process Clause to protect her property interests, Guadalupe Jimenez invoked the same protection for his "fundamental interest in liberty." See also Armstrong v. Manzo, 380 U.S. 545 (1965); Sniadach v. Family Finance Co., 395 U.S. 337 (1969); Goldberg v. Kelly, *supra*; Wisconsin v. Constantineau, *supra*.

In response to Appellants' challenges under both the Due Process and Equal Protection Clauses the districts have sought refuge behind the sweeping language of this Court's opinion in Hunter v. City of Pittsburgh, 207 U.S. 161 (1907), and its progeny. The broad generalizations of the Hunter opinion, purporting to leave the states absolutely free to do as they will with their political subdivisions, were sharply restricted some fifty-three years later in Gomillion v. Lightfoot, 364 U.S. 339 (1960). Mr. Justice Frankfurter stated in his opinion for the Court as follows:

Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that give rise to them, must not be applied out of context in disregard of variant controlling facts. Thus, a correct reading of the seemingly unconfined dicta of Hunter and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases. 364 U.S. at 343-344.

* * *

This line of authority conclusively shows that the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. 364 U.S. at 344-345.

Hence, whatever non-justiciability notions might have been present in Hunter were laid to rest in Gomillion. The districts' actions, therefore, are not immune from review.

B. The Exclusion Of Appellants' Communities From The Districts For Impermissible Political Motives Denied Appellants The Equal Protection Of Law.

The stipulated evidence and the Appellees' own judicial admissions confirmed the plaintiffs' original suspicions that the exclusion statute was a device created by the Valley water districts for the purpose of fencing the colonias out of the districts for the constitutionally impermissible reason that the urban residents constituted a political threat to continued farmer control of the

districts. In short, the colonias residents have been the victims of an invidiously discriminatory political gerrymander. They have been "fenced out" of the water district electorates because of the defendants' fears of the "political mischief" they might cause.

Just as Gomillion v. Lightfoot, supra, prohibits a racially motivated gerrymander under the Fifteenth Amendment, the Fourteenth Amendment is likewise a bar to political gerrymanders. The Equal Protection Clause prohibited the State of Texas from fencing servicemen out of the county electorate in Carrington v. Rash, 380 U.S. 89 (1965):

"Fencing out" from the franchise a sector of the population because of the way they might vote is constitutionally impermissible. "The exercise of rights so vital to the maintenance of democratic institutions," Schneider v. State, 308 U.S. 147, 161, 84 L.Ed. 155, 165, 60 S.Ct. 146, cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents. 380 U.S. 89, at 94.

That obliteration is exactly what the defendant directors have accomplished by Article 8280-3.2. See also Evans v. Cornman, 398 U.S. 419 (1970).

Although this Court has on previous occasions indicated that legislative districts may not be drawn so as to invidiously discriminate against or cancel out

political elements of the voting population, Gaffney v. Cummings, 412 U.S. 735 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Abate v. Mundt, 403 U.S. 182 (1971); that indication has not been applied as yet to invalidate a boundary-drawing scheme. Article 8280-3.2 presents the Court with an obvious example of the need for such a ruling.

II. The District Court Decision Is In Conflict With Applicable Decisions Of This Court.

Section 4 of Article 8280-3.2, V.A.T.C.S., after stating the requirements for notice to ordinary people, then establishes the following requirements for notice to a railroad company:

In the event railroad right-of-way is involved herein, notice shall be given to the railroad company by mailing, first class, a true copy of the same, properly addressed to the offices of the railroad at the address as it appears on the last approved county tax roll. Acts 1971, 62nd Leg., p. 814, Ch. 86, Sec. 4.

The classification in the statute is one between railroads, on the one hand, and all other natural persons and corporations on the other. The lower court fell into error by its characterization of the interests the Appellants were asserting. The district court, in a footnote, indi-

cated that the Appellants merely had an interest in receiving "notice of local legislative proceedings." By not recognizing Appellants' fundamental interest in protecting their voting rights, the lower court required the defendants to bear the fairly nominal burden of showing that the differing treatment for railroads bears some rational relationship to a permissible state objective. The court found justification for actual notice to railroads on the basis that only railroads had such widespread holdings that it would be a burden upon that type of corporation, and no others, to have to rely upon constructive notice.

Of course, the defect in the lower court's reasoning is in its treatment of the Appellants' interest. Had that court recognized the natural and intended consequence of Appellees' actions--the foreclosure of the colonias dwellers' voting rights, then a more rigorous standard of review would surely have been imposed. The district directors would have been required to show that the classification favoring railroads with actual notice was reasonably necessary to promote a compelling state interest. Dunn v. Blumstein, 405 U.S. 330 (1972). Even assuming, arguendo, that railroads have a difficult task in obtaining information regarding the actions of local governmental bodies, it is unreasonable to assume that only railroads are so disadvantaged. Not only is the classification unreasonable on its face, the state interest being advanced remains well hidden. The 2,958 excluded residents

of District No. 2 are equally as deserving of actual notice, by first class mail, as are the railroads.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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January, 1976.

APPENDIX

OPINION OF THE
THREE-JUDGE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

GUADALUPE JIMENEZ, BERNABE	X	
ROBLES, ISABEL CERVANTES,	X	
MARIO RODRIGUEZ, PABLO	X	
ALBISO, ALBINO OVIEDO,	X	
ESPERANZA SAENZ, RAMIRO	X	
GARCIA, JUAN RAMOS, ERASMO	X	
MEDELES, MAGDELENO MONTES,	X	
AMELIA MARAMILLO (sic),	X	
MARCOS LANDEROS and MARTIN	X	
GONZALEZ	X	
	X	
V.	X	Civil Action
	X	No. 72-B-171
HIDALGO COUNTY WATER	X	
IMPROVEMENT DISTRICT	X	
NO. 2, A. E. ELLIOTT,	X	
GEORGE HINKLE, E. R.	X	
RUSSELL, E. W. GENENWEIN,	X	
WILLIAM BUSCH, HIDALGO	X	
AND CAMERON COUNTIES WATER	X	
CONTROL AND IMP. DISTRICT	X	
NO. 9, RALPH POWELL, S. H.	X	
TURBERVILLE, KIRK SCHWARZ,	X	
B. J. HELLER and TOM	X	
SOLEATHER	X	

American Civil Liberties Union Foun-
dation (Melvin Wulf, Joel Gora and
Burt Neuborne), of New York City;
and American Civil Liberties Union
Foundation-South Texas Project

(David G. Hall) of San Juan, Texas; for Plaintiffs.

Atlas, Hall, Schwarz, Mills, Gurwitz & Bland (Morris Atlas and Harry L. Hall), of McAllen, Texas; for Defendants Hidalgo County Water Improvement District No. 2, Its Officers, Directors and Manager.

Smith, McIlheran, McKinney & Yarbrough (Garland F. Smith), of Weslaco, Texas; for Defendants Hidalgo and Cameron Counties Water Control and Imp. District No. 9, and Its Directors.

Ewers, Toothaker, Ewers, Abbott, Talbot, Hamilton & Jarvis (Glenn Jarvis and Neil Norquest), of McAllen, Texas; for Amicus Curiae Donna Irrigation District, Hidalgo County Number One.

Neal King, of Mission, Texas; for Amici Curiae Water Districts.

MEMORANDUM AND ORDER

Before GEE, Circuit Judge, GARZA and COX, District Judges.

GEE, Circuit Judge:

This suit is brought by plaintiff Guadalupe Jimenez and thirteen other named plaintiffs, former residents of defendant Hidalgo County Water Improvement District No. 2 or defendant Hidalgo

and Cameron Counties Water Control and Improvement District No. 9, against certain directors of the two defendant water districts, in their official capacities only. Plaintiffs sue for a class comprising all those persons whose lands have been excluded from the defendant water districts without actual personal notice to the owners thereof, or persons in possession of such lands and who do not want their lands excluded from the defendant water districts.

Plaintiffs seek an injunction setting aside the January 1973 water district elections and ordering defendants to hold new elections in each of defendant water districts, since by reason of the exclusion of their lands from such districts plaintiffs were unable to vote in the January water district elections and will be unable to vote in future water district elections. In addition, they would have this court enjoin defendants from excluding "urban property" as defined in Article 8280-3.2, TEX. REV. CIV. STAT. ANN., from the corporate boundaries of the defendant water districts and would have this court declare both that Article 8280-3.2 is unconstitutional on its face and as applied to them and the class they represent and that the action of defendants in excluding "urban property" pursuant to such statute is null and void and of no effect at law.

Jurisdiction is predicated upon 28 U.S.C. §§ 1331, 1343, 2201 and 2202; upon 42 U.S.C. § 1983; and upon the Fifth and Fourteenth Amendments to the Constitution of the United States. This three-

judge court was convened by order of the United States Court of Appeals for the Fifth Circuit. Jimenez v. Hidalgo County Water Improvement District No. 2, 496 F. 2d 113 (5th Cir. 1974).

The facts of this case are stipulated and have been found by this court to be as stipulated.

Defendant water districts are political subdivisions of the State of Texas, similar to municipalities and other special-purpose districts governed by state statutes. The two districts were organized pursuant to Article 16, § 59 of the Texas Constitution and are governed by Chapter 51 of the Texas Water Code. The state legislature has delegated to such water control and improvement districts the authority to administer the state's water resources by means of their respective water rights. Water districts have been granted broad powers to effectuate their purposes, e.g., the power of eminent domain, the power to acquire property, the power to tax for certain purposes, the power to borrow money and issue bonds, the power to make contracts and engage in large-scale construction projects, and the power to hire numerous employees to implement the goals of the district and enforce district regulations. See generally Chapter 51, TEXAS WATER CODE. In essence, water districts have been endowed by the legislature with all powers necessary to carry out their purposes. Each district operates through a board of directors, each of whom must own land within the district.

Plaintiffs herein complain of the exclusion of their lands from the defendant districts. A preliminary examination must therefore be made of the procedure used in excluding such lands. Article 8280-3.2, TEX. REV. CIV. STAT. ANN., the statute challenged in this lawsuit, reads, in pertinent part, as follows:

Art. 8280-3.2 Water Control improvement districts; exclusion of urban property

Section 1. As used in this Act:

(a) "Urban property" means land which has been subdivided into town lots, or town lots and blocks, or small parcels of the same general nature of town lots, or town blocks and lots, designed, intended or suitable for residential or other non-agricultural purposes, as distinguished from farm acreage, including streets, alleys, parkways, parks and railroad property and rights-of-way in such subdivision; whether such subdivision be within or near any established city, town or village, or not; and whether or not a plat or map of such subdivision has been duly filed for record and recorded in the office of the county clerk of the county in which such subdivision or any part thereof is situated. Urban property shall not be deemed to include land, which is or has been within one year previous to the date of the hearing hereinafter provided, used for farming or

agricultural purposes.

(b) "District" means any water control and improvement district now existing or hereafter created for the principal purpose of, or principally engaged in, furnishing water for the irrigation of agricultural lands and having no outstanding bonded indebtedness owing by such water control and improvement district at the time of the hearing hereinafter provided, or having indebtedness only in connection with a loan from an agency of the United States, provided written consent from an authorized representative of the agency of the United States involved to the proposed exclusion hereunder is on file with the district prior to the time of the hearing hereinafter provided.

Section 2. Urban property located within the boundaries of a district may be excluded from such district by the Board of Directors after a hearing by the Board of Directors called and held as hereinafter set forth.

Provision is then made for hearing and notice which will be hereinafter discussed.

Preamble

The alteration of the boundaries of political subdivisions by the state is a political function entirely within the power of the state legislature to regu-

late. This principle was enunciated by the Supreme Court in 1907, in the case of *Hunter v. City of Pittsburgh*, 207 U.S. 161. The Court stated, at pages 178 and 179:

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.... The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally and unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislature body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State, and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.

In *Detroit Edison Co. v. East China Township School District*, 378 F.2d 225 (6th Cir.), cert. denied, 389 U.S. 932 (1967), the court held that any alteration of municipal boundaries was completely discretionary with the State and not confined by any rights secured by the federal Constitution. The Fifth Circuit Court of Appeals, in affirming a case appealed from this court, has stated that in regard to annexations: "[T]he annexation of lands to a city has been held without exception to be purely a political matter entirely within the power of the State Legislature to regulate." *Hammonds v. City of Corpus Christi, Texas*, 343 F.2d 162, 163 (5th Cir.), cert. denied, 382 U.S. 837 (1965). See also, *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir.), cert. denied sub nom, *Ocean Hill Country Club, Inc. v. Knoxville*, 389 U.S. 975 (1967). It is therefore clear that the power of political subdivisions of states, such as municipalities and water

districts, to alter their boundaries, is almost absolute as far as the federal Constitution is concerned.

Gerrymandering

Plaintiffs, however, first object to the exclusion of their urban areas pursuant to state law as a political gerrymander. At the outset they characterize their line of attack generally: "[T]he Defendants denied Plaintiffs equal protection of the law by fencing them out of the electorate for political reasons." In the body of their argument the attack is sharpened and particularized:

Article 8280-3.2 has, in effect as well as purpose, countenance a political gerrymander.¹ Here the gerrymander is not directed solely to a class defined by race or national origin, but rather it is directed against a class of urban residents--a class which poses a threat to Defendants' irrigation programs when presented in the form of bond elections and a class which poses a threat to Defendants' continued political control of the Districts. As Mr. Justice Frankfurter observed in *Gomillion v. Lightfoot*, 364 U.S. 339, at 347 (1960):

While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in

geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.

By substituting "urban" for the word "colored" in that statement, Justice Frankfurter described the Defendants' actions here. (footnote added).

Finally, the argument is rounded out by analogy to such authorities as *Carrington v. Rash*, 380 U.S. 89 (1965) and *Evans v. Cornman*, 398 U.S. 419 (1970), involving manipulation of state residency requirements to deny the general franchise to servicemen or to residents of federal enclaves. Though the position is ingenious, we are not persuaded.

The summons to us, in the name of Gomillion, to pursue the gerrymander into the depths of the political thicket is one which has been often ignored² or declined³ by the Supreme Court: the trumpet has not given even an uncertain sound, it has lain all but mute. And Gomillion, which might once have appeared the thin entering wedge of the amendments into state gerrymandering, with the Fifteenth shortly to be joined in the breach by the Fourteenth, etc., has suffered a different fate. In its more recent expressions, the Court has seemed to see the case more as a specific instance of the general invalidity of racially-motivated official actions than as one primarily concerned with the gerrymander. It has, for example, not been four months since Mr. Justice White, writing for the Court in a case involving an annexation attacked as

racially motivated, cast Gomillion's effect as follows:

An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 [of the Voting Rights Act of 1965, 42 U.S.C. § 1973c] forbids voting changes taken with the purpose of denying the vote on the grounds of race or color. Congress surely has the power to prevent such gross racial slurs, the only point of which is "to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." *Gomillion v. Lightfoot*, 364 U.S. 339, 347, 5 L.Ed.2d 110, 81 S.Ct. 125 (1960). Annexations animated by such a purpose have no credentials whatsoever; for "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end...." *Western Union Telegraph Company v. Foster*, 247 U.S. 105, 114, 62 L.Ed. 1006, 38 S.Ct. 438, 1 A.L.R. 1278 (1918); *Gomillion v. Lightfoot*, supra, at 347, 5 L.Ed.2d 110, 81 S.Ct. 125. An annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by § 5, whatever its actual effect may have been or may be. (emphasis added.)

City of Richmond v. United States, ___ U.S. ___, 45 L.Ed.2d 245, 260 (1975). Nor

is this development of Gomillion, if such it be, surprising, for the opinion itself makes plain that it dealt with something over and beyond "familiar abuses of gerrymandering."⁴

Here we face, at worst, such a familiar abuse. Were we to accept in full plaintiffs' view of defendants' actions--that they represent a politicized drawing of boundaries having as its aim precisely and nothing but the perpetuation in power of the dominant body in a state political subdivision--plaintiffs would confront nothing that minority political bodies have not faced, in the South and elsewhere, from time immemorial.⁵ That the practice is odious and unfair is too patent to require discussion; we take it as granted. But much in the political process is, or may be made, unfair, and we hold no general warrant to correct inequity. The United States and all state Constitutions contemplate representative, rather than town-meeting, government in the legislative branch. So long as this is so it will be possible that the views of any minority in any given political subdivision will go unrepresented, except insofar as the sense of fairness of the representative elected by the dominant faction moves him to give it voice and effect. One such view will be on how boundaries of political subdivisions should be drawn, and into the opposing views on this question will doubtless sometimes enter unfortunate considerations of maximizing the voting power of some political blocs and dispersing that of others on a territorial basis--gerrymandering. But, though Gomillion⁶ teaches that this may

not be done on racial grounds, courts have stood abashed before its accomplishment on others, finding no constitutional tool to apply and, perhaps, fearing that judicial intrusion so near the heart of the political process would be a desperate remedy worse than the disease.

Nor do such cases as Carrington⁷ or Cornman⁸ aid plaintiffs' case, for they are clearly distinguishable. Each involves denial of the franchise to persons who are to remain within and subject to the political entity in which they seek to vote. And Mr. Justice Marshall, writing for the Court in Cornman, places the Court's decision that Maryland could not deny the franchise to domiciliaries of a federal enclave squarely on the basis of the broad powers exercised over the domiciliaries and their property by Maryland. The core of his opinion centers on the trial court's finding that the plaintiffs "...are treated by the State of Maryland as state residents to such an extent that it is a violation of [the Equal Protection Clause of] the Fourteenth Amendment for the State to deny them the right to vote."⁹ Our plaintiffs, to the contrary, are not part of or subject to the water district excluding them at all, for by the act of exclusion it renounced all power over them or their property. Plaintiffs' claim is beyond our warrant, and their invitation to rewrite Gomillion--and the Fifteenth Amendment--to read "urban" for "race" or "color" must be declined. Such a revision is beyond our competence and, if to be taken in hand by judges, must be by those from whose decisions there is no appeal.

Sufficiency (sic) of Constructive Notice

A major issue in this case is one of the sufficiency of notice. Plaintiffs' argument rests largely upon the fact that each individual plaintiff and members of the class plaintiffs represent did not receive personal notice of the hearings concerning exclusion of their lands from the districts. Article 8280-3.2, the statute plaintiffs herein attack, sets forth the requirements for notice prior to exclusion of lands from a water district. It has been stipulated between the parties that the provisions of Article 8280-3.2 were complied with by both districts. Plaintiffs contend, however, that Article 8280-3.2 notice is insufficient. This court does not agree.

Section 3 of Article 8280-3.2 provides for the adoption of a resolution by the board of directors of a water district calling for a hearing to determine whether or not all or part of any urban property shall be excluded from the district. The resolution is to set forth a description of the property to be excluded, and the date, time and place such hearing is to be held.

The notice provisions of Article 8280-3.2 are as follows:

Section 4. It shall be the duty of the Board of Directors to cause notice of such hearing to be given by posting a true copy of the resolution referred to in the preceding section at the courthouse door of the county in which such district

or any portion thereof is situated, at a location in or near the urban property proposed for exclusion, and also in a conspicuous place in the principal office of the district for at least three (3) weeks before the date of such hearing. The date, time, place and purpose of such hearing shall also be advertised by publishing notice thereof one time in one or more newspapers giving general circulation in the district, such publication to be at least ten (10) days prior to the date of hearing. In the event railroad right-of-way is involved herein, notice shall be given to the railroad company by mailing, first class, a true copy of the same, properly addressed to the offices of the railroad at the address as it appears on the last approved county tax roll.

The statute proceeds to provide that such a hearing may be continued from time to time until all persons who appear and are entitled to be heard have been heard and that thereafter the board of directors shall determine and find,¹⁰ before excluding it, that such urban property is not used or intended to be used for agricultural purposes, that it would be in the best interest of the district and of the urban property to exclude such property and that the owners of a majority in acreage of such urban property do not desire irrigation of their property.

Plaintiffs contend that Article 8280-3.2 is unconstitutional on its face because it does not provide for notice to

each individual landowner affected by the exclusion of urban property, that it creates a favored class as regards notice, i.e., the railroad, and that plaintiffs, who are largely of Mexican-American descent, should have received not only individual notice but notice in the Spanish language.

Notice of the type required by Article 8280-3.2 is the type provided for in almost all states when personal notice is not required. Examples of some proceedings in Texas of which notice may be given by publication or posting or both are: (1) the annexation of additional territory by drainage districts or conservation and reclamation districts, TEX. REV. CIV. STAT. ANN. art. 8176b; (2) the creation or extension of navigation districts, TEXAS WATER CODE ANN. § 61.028; (3) the annexation or deannexation of territories by cities, TEX. REV. CIV. STAT. ANN. art. 970a §§ 6 and 10c; (4) the creation of fresh water supply districts, TEXAS WATER CODE ANN. §§53.016 to 53.019, inclusive; and (5) the exclusion of lands from fresh water supply districts, TEXAS WATER CODE ANN. § 53.233.

Reasons for choosing the method of notice provided in Article 8280-3.2 are manifest. For example, within Hidalgo County Water Control and Improvement District No. 2, a defendant herein, there are some 2,061 property owners owning more than one acre of land in the district. If landowners in excluded areas are entitled to notice, certainly the remaining landowners would be entitled to notice also, as their property would be subjected

to greater taxes because of the decreased area. There are approximately 2,958 owners of lots in the excluded areas. Personal notice to all landowners in both English and Spanish would mean that some 10,000 notices to over 5,000 owners would have to be sent. A similar problem would confront defendant District No. 9.

In fixing the boundaries of political subdivisions,

[T]he legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question.

Falbrook Irrigation District v. Bradley, 164 U.S. 112, 174-75 (1896). See also, Chesebro v. Los Angeles County Flood Control District, 306 U.S. 459 (1939). As the aforementioned cases indicate, plaintiffs have not suffered and will not suffer a loss of constitutional dimensions, and therefore the quantum of notice to be afforded plaintiffs will be gauged accordingly. Plaintiffs' reliance on such cases as Schroeder v. City of New York, 371 U.S. 208 (1962), Walker v. City of Hutchinson, 352 U.S. 112 (1956), and Mullane v. Cen-

tral Hanover Bank and Trust Co., 339 U.S. 306 (1950), is misplaced. Each of those cases involved an existing, tangible property interest, as opposed to what here seems to be at best an intangible, possible future interest of undetermined nature. Notice similar to the notice provided for in Article 8280-3.2, i.e., by publication, has routinely been upheld in cases concerning the formation of water districts. *Orr v. Allen*, 245 F. 486 (N. D. Ohio 1917), *aff'd* 248 U.S. 35 (1918); *San Saba County Water Control and Improvement District No. 1 v. Sutton*, 12 S.W.2d 134 (Tex. Comm'n App. 1929, *jdmt.* adopted); *Tarrant County Water Control & Improvement District No. 1 v. Pollard*, 12 S.W.2d 137 (Tex. Comm'n App. 1929, opinion adopted). See also, *Rutledge v. State*, 7 S.W.2d 1071 (Tex. 1928).

This court, therefore, holds that the personal notice to landowners of the exclusion of lands from a water control and improvement district is not required and, therefore, that the notice provisions of Article 8280-3.2 are constitutional.

Equal Protection: Actual Notice
to the Railroads

Plaintiffs also contend that the notice provision of Article 8280-3.2 is unconstitutional in that it denies them equal protection of the laws. They point to the provision of the statute which allows them to be notified of the exclusion proceedings constructively but requires that railroads be given actual notice by mail. This, they say, creates categories

and treats them differently.

There is, of course, no doubt that Texas, in exacting the notice provision of Article 8280-3.2, chose to treat the railroads differently from other persons, both real and corporate. But neither the creation of categories nor differentiations in treatment are *per se* violations of the Equal Protection Clause. Even when suspect categories or fundamental rights are involved, a state may treat different groups differently if there exists a compelling governmental interest in doing so. And when, as here, the legislation attacked involves neither fundamental rights¹¹ nor classifications based upon suspect criteria, it will be sustained unless it discriminates invidiously or unless the classification and differing treatment bears no rational relationship to a permissible state objective. See *Schilb v. Kuebel*, 404 U.S. 357, 364-65 (1971). The discrimination between railroads and all others is by no means invidious. Moreover, since an obvious objective of the notice provision of Article 8280-3.2 is to insure that all interested parties have a reasonable opportunity to be apprised of the potential exclusion of their property from a water control and improvement district, there is certainly strong justification for providing for special notice to railroads. Railroads run from coast to coast and throughout Texas. Each of some 254 counties in Texas contain numerous political subdivisions, school districts, cities and other agencies of the state capable of affecting the railroads' interest through taxes or otherwise. For a railroad company cover-

ing a large area, the task of acquainting itself with the activities of a multitude of state and local agencies would be monumental. Thus, it was rational for the Texas Legislature to suppose that in order for the railroads to be apprised of local happenings they, more than local residents or landowners, would need actual notice. And it was permissible for it to provide that such notice be given them.

Having dealt with plaintiffs' contentions, we conclude that the relief sought by them must be DENIED.

THOMAS GIBBS GEE
United States Circuit
Judge

REYNALDO G. GARZA
United States District
Judge

OWEN D. COX
United States District
Judge

FOOTNOTES

1. It should be borne in mind that plaintiffs' basic attack is on the Texas statute, it being argued by all that the statutory procedure for exclusion was correctly followed.
2. E.g., although political gerrymandering was an issue and was discussed by the district court in *Graves v. Barnes*, 343 F.Supp. 704, 734 (W.D. Tex. 1972), the Supreme Court failed to even mention the question in affirming in part and reversing in part, *White v. Register*, 412 U.S. 755 (1973).
3. In *Gaffney v. Cummings*, 412 U.S. 735, 37 L.Ed.2d 298, 93 S.Ct. 2321 (1973), a somewhat diffuse spray of cold water was made to play on the complaints there made of political gerrymandering. See text discussion at 412 U.S. 751-54, 37 L.Ed.2d 311-13, 93 S.Ct. 2330-32 and footnote 18, *loc sit*, remarking:

Appellees also maintain that the shapes of the districts would not have been so "indecent" had the Board not attempted to "wiggle and joggle" boundary lines to ferret out pockets of each party's strength. That may well be true, although any plan that attempts to follow Connecticut's "oddly shaped" town lines (App. 98) is bound to contain some irregularly shaped districts. But

compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts. Cf. *White v. Weiser*, 412 U.S. 783, 37 L. Ed.2d 335, 93 S.Ct. 2348; *Wright v. Rockefeller*, 376 U.S. 52, 54, 11 L.Ed.2d 512, 84 S.Ct. 603 (1964, and *id.*, at 59-61, 11 L. Ed.2d 512 (Douglas, J., dissenting)).

4. 364 U.S. 339, 341.
5. In posing the hypothetical--and it is only a hypothetical, we make no finding--we have in mind the alleged intentions of the districts' directors, who, by their actions, excluded the plaintiffs' land. Courts do not presume that state legislatures have acted in bad faith. Nor does the intent of the legislature invalidate otherwise constitutional legislation. *Palmer v. Thompson*, 403 U.S. 217 (1971); *United States v. O'Brien*, 391 U.S. 367 (1968); *Fletcher v. Peck*, 10 U.S. (6 Cr ch) 87 (1810). The same rule applies here.
6. And a myriad voting rights cases, such as *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Wright v. Rockefeller*, 376 U.S. 60 (1964); *Gilbert v. Sterrett*, 509 F.2d 1389 (5th Cir. 1975); *Cousins v. City Council of the City of Chicago*, 466 F.2d 830 (7th Cir.), cert. denied, 409 U.S. 893 (1972).

7. *Carrington v. Rash*, 380 U.S. 89 (1965).
8. *Evans v. Cornman*, 398 U.S. 419 (1970).
9. 398 U.S. 419, 424-25.
10. As it did in this case, findings which are not attacked before us.
11. The right to vote is, of course, fundamental, but the statute does not concern itself with classification and voting but rather with classification and notice of local legislative proceedings. There is no fundamental right for all to receive notice of each happening within the political sphere.

OPINION OF THECOURT OF APPEALS

Guadalupe JIMENEZ et al.,
Plaintiffs-Appellants,

V.

HIDALGO COUNTY WATER IMPROVEMENT
DISTRICT NO. 2 et al.,
Defendants-Appellees.

No. 73-3557.

United States Court of Appeals,
Fifth Circuit.

June 17, 1974.

Appeal from the United States
District Court for the Southern District
of Texas.

Before TUTTLE, COLEMAN and AINSWORTH,
Circuit Judges.

AINSWORTH, Circuit Judge:

Plaintiffs filed this complaint for declaratory and injunctive relief on their own behalf and on behalf of a class of persons similarly situated "composed of all those persons whose lands were excluded from the Defendant Water District without actual personal notice to the

owners of persons in possession of such lands . . . who do not want their lands excluded from the Defendant Water District." They specifically assert the unconstitutionality of article 8280-3.2, Vernon's Tex. Ann. Civ. St., under which the action of the defendant water districts occurred and pursuant to which constructive public notice of a meeting of the district for the purpose of excluding certain lands from the district was made by publication and posting, and not by personal notice to the members of the class.¹

1. Vernon's Ann. Tex. Civ. St. article 8280-3.2 reads in full as follows:
Section 1. As used in this Act:
(a) "Urban property" means land which has been subdivided into town lots, or town lots and blocks, or small parcels of the same general nature of town lots, or town blocks and lots, designed, intended or suitable for residential or other nonagricultural purposes, as distinguished from farm acreage, including streets, alleys, parkways, parks and railroad property and rights-of-way in such subdivision; whether such subdivision be within or near any established city, town or village, or not; and whether or not a plat or map of such subdivision has been duly filed for record and recorded in the office of the county clerk of the county in which such subdivision or any part thereof is situated. Urban property shall not be deemed to

Note 1--Continued

include land, which is or has been within one year previous to the date of the hearing hereinafter provided, used for farming or agricultural purposes.

(b) "District" means any water control and improvement district now existing or hereafter created for the principal purpose of, or principally engaged, in, furnishing water for the irrigation of agricultural lands and having no outstanding bonded indebtedness owing by such water control and improvement district at the time of the hearing hereinafter provided, or having indebtedness only in connection with a loan from an agency of the United States, provided written consent from an authorized representative of the agency of the United States involved to the proposed exclusion hereunder is on file with the district prior to the time of the hearing hereinafter provided.

Sec. 2. Urban property located within the boundaries of a district may be excluded from such district by the Board of Directors after a hearing by the Board of Directors called and held as hereinafter set forth.

Sec. 3. The Board of Directors of a district may by majority vote adopt a resolution calling a hearing to determine whether or not all or any part or parts of any urban property shall be excluded from the district. The resolution adopted by the Board of Directors shall describe the urban

Note 1--Continued

property proposed for exclusion by metes and bounds, by lots, blocks and subdivision or by other legal description so as to definitely identify the same, and such resolution shall set forth the purpose of the hearing as well as the date, time and place at which such hearing shall be had.

Sec. 4. It shall be the duty of the Board of Directors to cause notice of such hearing to be given by posting a true copy of the resolution referred to in the preceding section at the courthouse door of the county in which such district or any portion thereof is situated, at a location in or near the urban property proposed for exclusion, and also in a conspicuous place in the principal office of the district for at least three (3) weeks before the date of such hearing. The date, time, place and purpose of such hearing shall also be advertised by publishing notice thereof one time in one or more newspapers giving general circulation in the district, such publication to be at least ten (10) days prior to the date of hearing. In the event railroad right-of-way is involved herein, notice shall be given to the railroad company by mailing, first class, a true copy of the same, properly addressed to the offices of the railroad at the address as it appears on the last approved county tax roll.

Note 1--Continued

Sec. 5. If, as a result of such hearing, which may be continued from day to day, and from time to time until all persons entitled to be heard and who appear at said hearing have had an opportunity to be so heard and offer evidence, the said Board of Directors shall determine and find (a) that the owners of a majority in acreage of such urban property do not desire irrigation of the same; or

(b) that such urban property is not used or intended to be used for agricultural purposes; and

(c) that it would be to the best interest of said district and of the urban property proposed to be excluded or any part or parts thereof, that it be excluded from the district, said Board of Directors shall adopt a resolution setting forth such determination and findings and excluding the urban property or such part or parts thereof as to which such determination and finds are made. Should any canals, ditches, pipelines, pumps or other facilities of the district be located upon lands excluded in the resolution of the Board of Directors, such exclusion shall not affect nor interfere with any rights which the district might have to maintain and continue operation of the facilities as located for the purpose of servicing lands remaining in the district. A copy of said resolution excluding urban

Note 1--Continued

property from the district certified to and acknowledged by the Secretary of the Board of Directors shall be recorded by the district in the Deed Records in the county in which the excluded property is situated as evidence of such exclusion.

Sec. 6. From and after the adoption of a resolution by the Board of Directors excluding urban property the excluded property shall constitute no part of such district and shall have no further liability thereafter to said district for taxes, assessments or other charges of the district, but any taxes, assessments or other charges owing to the district at the time of exclusion shall remain the obligation of the landowner and shall continue to be secured by any and all statutory liens, if any.

Acts 1971, 62nd Leg., p. 814, ch. 86, eff. Aug. 30, 1971.

On October 28, 1971, the board of directors of defendant Hidalgo County Water District No. 2 ordered the exclusion of 36 rural subdivisions in which plaintiffs and their class reside. On September 6, 1972, the board of directors of defendant Hidalgo and Cameron Counties Water Control and Improvement District No. 9 excluded 40 of such subdivisions. These are very large water districts situated in the most populous regions of the Lower Rio Grande Valley at the southernmost tip of Texas.

Plaintiffs complain that they have been deprived of their right to vote for members of the board of directors of the defendant water district of the districts' action in excluding the areas in which they live from the territorial limits of the defendant water districts. Under Vernon's Ann. St. Texas Constitution, article 6, §2, a person must reside in the district in which he intends to vote. Plaintiffs desire to assert the right to vote for directors so that eventually they may be able, through directors elected by them, to change the policy of the defendant water district from one primarily devoted to irrigation for agriculture to one also engaged in providing domestic water and sanitation services for the poor unincorporated rural areas (colonias) in which they and their class reside. Thus exclusion of the territory in which they live by action of defendant boards, pursuant to the constructive notice provisions of article 8280-3.2, is, they assert, an unconstitutional deprivation of their

right to vote, contrary to the Fourteenth Amendment and the due process clause thereof.

Plaintiffs contend that the constructive notice contemplated by article 8280-3.2 fails to comply with procedural standards required by the due process clause when political subdivisions of a state, such as the water districts here, exclude a substantial number of the residents of those districts thereby terminating their political rights within the subdivision, including any rights to receive services from these political units. They cite decisions of the Supreme Court on the issue of the sufficiency of notice under the due process clause, such as the leading case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); also *Schroeder v. City of New York*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962), and others. They contend that a real opportunity to be heard must be offered by a water district which proposes to de-annex the property of numerous citizens from the limits of the district. They aver that since 1920, in the case of San Juan District (Water District No. 2), and since 1928, in the case of Mercedes District (Water District No. 9), the plaintiffs and their class have been divested by the defendant water districts with only the constructive notice to affected citizens by publication and posting.

Plaintiffs assert that none of the plaintiffs or their class received any

actual notice of the hearings which were to consider exclusion of their communities from the districts; that the predominant language of most of the residents of the colonias is Spanish and many do not read, write or understand the English language; that the names and addresses of the persons affected by the exclusion were readily available in the public records of the Hidalgo County Tax Assessor-Collector and it would have been possible to have copied these names and addresses from the tax records so that actual notice could have been given. Plaintiffs contend, therefore, that insufficiency of notice had deprived them of their right to a hearing.

On the other hand, the defendant water districts contend that the type of notice complained of in this case is universally provided in similar proceedings in practically every state in the Union and that it would be a practical impossibility to give the kind of notice which plaintiffs contend is minimally required by the due process clause. They point out that similar notice provisions have been upheld by the Texas Supreme Court in Tarrant County Water Control & Improvement District No. 1 v. Pollard, Attorney General, 118 Tex. 138, 12 S.W.2d 137 (1929); Rutledge v. State, 117 Tex. 342, 7 S.W.2d 1071 (1928) and Trimmier v. Carlton, 116 Tex. 572, 296 S.W. 1070 (1927). Defendants also contend that the cases cited by plaintiffs, such as Mullane and Schroeder, supra, are not authority for the proposition that in this type of exclusion

proceedings on property from the boundaries of a water control district, personal notice by mail is required nor is the type of notice one required in judicial proceedings.

Defendants cite the leading case of *Hunter v. Pittsburgh*, 207 U.S. 161, 28 S. Ct. 40, 52 L.Ed. 151 (1907), to the effect that the territory over which political subdivisions of the state shall exercise authority rests in the absolute discretion of the state. This is true, defendants argue, unless there is clear encroachment upon the provisions of the Fourteenth Amendment. Thus they conclude that the determination of what property should originally be included in water control and improvement districts or subsequently excluded was a political right clearly reserved to the State of Texas by the provisions of the Tenth Amendment. See *Johnson v. Hood*, 5 Cir., 1970, 430 F.2d 610.

Defendants conclude that there is no substantial constitutional question presented as to require convening of a three-judge court and accordingly that the district court was correct in so holding and in dismissing plaintiffs' suit.

This case is a companion case to *Juan Fonseca et al. v. Hidalgo County Water Improvement District No. 2 et al.*, decided this day, ___ F.2d ___, where we held that another constitutional attack on a Texas statute was not insubstantial under the tests correlated by the Supreme Court in the recent decision in

Goosby v. Osser, 409 U.S. 512, 93 S.Ct. 854, 35 L.Ed.2d 36. See also our recent decision in Sands v. Wainwright, 5 Cir., 1973, 491 F.2d 417. We are likewise unable to say here that the constitutional attack of plaintiffs is "essentially fictitious," "wholly insubstantial," "obviously frivolous," "obviously without merit," or that "its unsoundness so clearly results from the previous decisions of this [the Supreme] court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

It is necessary, therefore, that this case be remanded to the district court for the organization of a three-judge court, as required by 28 U.S.C. §2281.

Reversed and remanded.

OPINION OF THE
SINGLE-JUDGE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

GUADALUPE JIMENEZ, BERNABE	X
ROBLES, ISABEL CERVANTES,	X
MARIO RODRIGUEZ, PABLO	X
ALBISO, ALBINO OVIEDO,	X
ESPERANZA SAENZ, RAMIRO	X
GARCIA, JUAN RAMOS,	X
ERASMO MEDELES, MAGDALENO	X
MONTES, AMELIA JARAMILLO	X
MARCOS LANDEROS, and	X
MARTIN GONZALEZ,	X
	X
VS.	X CIVIL ACTION
	X NO. 72-B-171
HIDALGO COUNTY WATER IM-	X
PROVEMENT DISTRICT NO. 2,	X
A. E. ELLIOTT, GEORGE	X
HINKLE, E. R. RUSSELL, E.	X
W. GENENWEIN, WILLIAM	X
BUSCH, HIDALGO AND CAMERON	X
COUNTIES WATER CONTROL	X
AND IMP. DISTRICT NO. 9,	X
RALPH POWELL, S. H.	X
TURBERVILLE, KIRK	X
SCHWARZ, B. J. HELLER	X
and TOM SOLETH	X

and

JUAN FONSECA, EFREN RAMIREZ X
and MIGUEL RAMIREZ, X

VS.

HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 2,
A. E. ELLIOTT, GEORGE
HINKLE, E. R. RUSSELL, E.
W. GENEWEIN, WILLIAM
BUSCH and WALTER D.
BRANDT

X
X
X CIVIL ACTION
X NO. 72-B-180
X
X
X
X
X

American Civil Liberties Union Foundation (Melvin Wulf, Joel Gora and Burt Neuborne), of New York City; and American Civil Liberties Union Foundation-South Texas Project (David G. Hall), of San Juan; for Plaintiffs.

Atlas, Hall, Schwarz, Mills, Gurwitz & Bland (Morris Atlas and Harry L. Hall), of McAllen, Texas; for Defendants Hidalgo County Water Improvement District No. 2, Its Officers, Directors and Manager. Smith, McIlheran, McKinney & Yarbrough (Garland F. Smith), of Weslaco, Texas; for Defendants Hidalgo and Cameron Counties Water Control and Imp. District No. 9, and Its Directors.

Ewers, Toothaker, Ewers, Abbott, Talbot, Hamilton & Jarvis (Glenn Jarvis and Neil Norquest), of McAllen, Texas; for Amicus Curiae Donna Irrigation District, Hidalgo County Number One.

Neal King, of Mission, Texas; for Amici

Curiae Water Districts

MEMORANDUM AND ORDER

Two civil actions, both contesting the constitutionality of certain procedures taken by two state water districts are now before the Court. The two lawsuits, 72-B-171 and 72-B-180, are hereby consolidated for purposes of this Memorandum and Order.

The first suit, 72-B-171, is brought by Plaintiff Guadalupe Jimenez and thirteen other named Plaintiffs who reside within Defendant Hidalgo County Water Improvement District No. 2 or Defendant Hidalgo and Cameron Counties Water Control and Improvement District No. 9. Certain directors of the two Defendant water districts were also sued, in their official capacities only.

The gravamen of the complaint is that Plaintiffs' land was excluded from Defendant districts without actual personal notice to each individual Plaintiff of the exclusion proceedings. Plaintiffs seek an injunction setting aside the January, 1973, water district elections and ordering Defendants to hold new elections in each of Defendant water districts, since by reason of the exclusion of their lands from such districts, Plaintiffs were unable to vote in the January water

district elections and will be unable to vote in future water district elections. Plaintiffs would also pursue this lawsuit in behalf of a class, such class being all those persons whose lands were so excluded from the Defendant water districts without actual personal notice to the owners thereof, or persons in possession of such lands and who do not want their lands excluded from the Defendant water districts.

Plaintiffs would have this Court enjoin Defendants from excluding "urban property" as defined in Article 8280-3.2, TEX. REV. CIV. STAT. ANN., from the corporate boundaries of Defendant water districts. Plaintiff would also have this Court declare that Article 8280-3.2 is unconstitutional on its face, as applied to Plaintiffs and the class they represent, and that the actions of Defendants in excluding "urban property" pursuant to such statute is null and void and of no effect at law.

Jurisdiction is predicated upon 28 U.S.C. §§1331, 1343, 2201 and 2202; upon 42 U.S.C. §1983; and upon the 5th and 14th Amendments to the Constitution of the United States.

Defendant water districts are political subdivisions of the State of Texas, similar to municipalities and other special purpose districts governed by state statutes. The two districts were organized pursuant to

Article 16, §59 of the Texas Constitution, and are governed by Chapter 51 of the Texas Water Code. The state legislature has delegated to such water control and improvement districts the authority to administer the state's water resources by means of their respective water rights. Water districts have been granted broad powers to effectuate their purposes, e.g., the power to eminent domain, the power to acquire property, the power to tax for certain purposes, the power to borrow money and issue bonds, the power to make contracts and engage in large-scale construction projects, and the power to hire numerous employees to implement the goals of the district and enforce district regulations. See generally Chapter 51, Texas Water Code. In essence, water districts have been endowed by the legislature with all powers necessary to carry out their purposes. Each district operates through a board of directors, each of whom must own land within the district.

Plaintiffs herein complain of the exclusion of their lands without proper notice. A preliminary examination must therefore be made of the validity of the procedure used in excluding such lands. Article 8280-3.2, TEX. REV. CIV. STAT. ANN., the statute challenged in this lawsuit, reads, in pertinent part, as follows:

Art. 8280-3.2 Water Control improvement districts; exclusion of urban property

Section 1. As used in this Act:

(a) "Urban property" means lands which has been subdivided into town lots, or town lots and blocks, or small parcels of the same general nature of town lots, or town blocks and lots, designed, intended or suitable for residential or other nonagricultural purposes, as distinguished from farm acreage, including streets, alleys, parkways, parks and railroad property and rights-of-way in such subdivision; whether such subdivision be within or near any established city, town or village, or not; and whether or not a plat or map of such subdivision has been duly filed for record and recorded in the office of the county clerk of the county in which such subdivision or any part thereof is situated. Urban property shall not be deemed to include land, which is or has been within one year previous to the date of the hearing hereinafter provided, used for farming or agricultural purposes.

(b) "District" means any water control and improvement district now existing or hereafter created for the principal purpose of, or principally engaged in, furnishing no outstanding bonded indebtedness owing by such water control and improvement district at the time of the hearing hereinafter pro-

vided, or having indebtedness only in connection with a loan from an agency of the United States, provided written consent from an authorized representative of the agency of the United States involved to the proposed exclusion hereunder is on file with the district prior to the time of the hearing hereinafter provided.

Section 2. Urban property located within the boundaries of a district may be excluded from such district by the Board of Directors after a hearing by the Board of Directors called and held as hereinafter set forth.

Provision is then made for hearing and notice, which will be hereinafter discussed.

The procedure used in the alteration of the boundaries of political subdivisions by the state is a political function entirely within the power of the state legislature to regulate. This principle was enunciated by the Supreme Court in 1907, in the case of Hunter v. City of Pittsburgh, 207 U.S. 161. The Court stated, at pages 178 and 179:

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as

may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. ... The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right

by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.

In Detroit Edison Co. v. East China Township School District, 378 F.2d 225 (CA 6 1967), the Court held that any alteration of municipal boundaries was completely discretionary with the State and not confined by any rights secured by the federal constitution. The Fifth Circuit Court of Appeals, in affirming a case appealed from this Court, has stated that in regard to such annexations: "...the annexation of lands to a city has been held without exception to be purely a political matter entirely within the power of the state legislature to regulate". Hammonds v. City of Corpus Christi, Texas, 343 F.2d 162, 163 (CA 5 1965). See also Ocean Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (CA 6 1967). It is therefore clear that the power of political subdivisions of states, such as municipalities and water districts, to alter their boundaries, is almost absolute as far as the federal constitution is concerned.

Plaintiffs complain, however, that the exclusion of their lands in this

instance results in a deprivation of their rights to vote in water district elections. Plaintiffs assert that since the two water districts have the power to supply water for domestic uses, and that since Plaintiffs desperately require water for domestic use, that they are being deprived of the prospective right to use their votes in the future to influence the district to initiate such a domestic water program. This contention is analogous to the one espoused by the plaintiffs in Wilkerson v. Coralville, 41 LW 2638 (CA 8 April 30, 1973). Plaintiffs therein contended that the Equal Protection Clause prohibited a municipality from exercising its powers derived through the state law to refuse to annex an area because the residents there were impoverished and in need of facilities which would be furnished by the city were the area annexed. The Court stated that there is no right of annexation, regardless of the economic status of an area, and that whether a municipality should be permitted to encircle and exclude an impoverished area is a matter of legislative policy for the state. The same principle, applied to the instant case, results in the conclusion that the prospective benefits, if any, asserted by Plaintiffs do not give rise to any constitutionally protected rights; indeed, there is no constitutional right to a domestic water supply. Union Water Supply Corporation v. Vaughn, 355 F.Supp. 211 (SD Tex. 1972), aff'd 474 F.2d 1396 (CA 5 1973).

Plaintiffs herein complain that they are being divested of the right to vote and eventually create a domestic water supply for their properties. This Court, in considering this contention, must recognize that neither of Defendant Districts have ever exercised the power to build and operate treatment plants for the production of potable water for drinking and domestic purposes, but were organizing primarily for and have restricted their activities primarily to providing irrigation water to rural areas and raw river to municipalities and industries. In addition, this Court must take notice that numerous options are open to the inhabitants of the "urban properties" affected by the exclusions, such as the formation of Fresh Water Supply Districts. The Rio Grande Valley Authority and the Rio Grande Valley Pollution Control Authority contemplate area-wide domestic water and sewage treatment systems for the entire lower Valley. In addition, it may be noted, and the stipulations submitted by the parties show, that there are water supply corporations now existing which can reach many of the properties of Plaintiffs with existing lines or slight extensions of existing lines. It is not as if Plaintiffs are without better alternatives than the highly speculative procedure of using their votes to influence a political subdivision, i.e., a Defendant District, which lacks the purpose and expertise in the area of domestic water supply of

agencies already in existence.

The voting rights cases cited by Plaintiffs herein are not applicable in this case, as there has been no allegation that the general franchise was granted or denied to one group of persons to the detriment of another. There is no allegation herein that the votes of one group were vested with disproportionate power in comparison to others, or that any minority group was disfranchised. A property owner does not have an absolute constitutional right under the Due Process Clause of the 14th Amendment to vote on proposed municipal annexation. Adams v. City of Colorado Springs, 308 F.Supp. 1397 (DC Colo. 1970), aff'd 399 U.S. 901 (1970); reh.den. 400 U.S. 855 (1970). Certainly this principle applies to the exclusion of Plaintiffs' lands in this case. As far as the prospective right to vote in the water district elections, Plaintiffs herein have shown no deprivation of 14th Amendment magnitude.

The basic issue in this case is one of the sufficiency of notice. Plaintiffs' argument rests largely upon the fact that each individual plaintiff and member of the class Plaintiffs would represent did not receive personal notice of the hearings concerning exclusion of their lands from the districts. Article 8280-3.2, the statute Plaintiffs herein attack, sets forth the requirements for notice prior to exclusion of lands from a water dis-

trict. It has been stipulated between the parties that the provisions of Article 8280-3.2 were complied with by both districts. Plaintiffs contend, however, that Article 8280-3.2 notice is insufficient. This Court does not agree.

Section 3 of Article 8280-3.2 provides for the adoption of a resolution by the Board of Directors of a water district calling for a hearing to determine whether or not all or part of any urban property shall be excluded from the district. The resolution is to set forth a description of the property to be excluded and the date, time, and place such hearing is to be held.

The notice provisions of Article 8280-3.2 are as follows:

Section 4. It shall be the duty of the Board of Directors to cause notice of such hearing to be given by posting a true copy of the resolution referred to in the preceding section at the courthouse door of the county in which such district or any portion thereof is situated, at a location in or near the urban property proposed for exclusion, and also in a conspicuous place in the principal office of the district for at least three (3) weeks before the date of such hearing. The date, time, place and purpose of such hearing

shall also be advertised by publishing notice thereof one time in one or more newspapers giving general circulation in the district such publication to be at least ten (10) days prior to the date hearing. In the event railroad right-of-way is involved company by mailing, first class, a true copy of the same, properly addressed as it appears on the last approved county tax roll.

The statute proceeds to provide that such hearing may be continued from time to time until all persons who appear and are entitled to be heard have been so heard and that thereafter the Board of Directors shall determine and find that such urban property is not used or intended to be used for agricultural purposes, that it would be in the best interest of the district to exclude such property and that the owners of a majority in acreage of such urban property do not desire irrigation of their property.

Plaintiffs contend that Article 8280-3.2 is unconstitutional on its face because it does not provide for notice to each individual landowner effected by the exclusion of urban property, railroad, and that Plaintiffs, who are largely of Mexican-American descent, should have received not only individual notice, but notice in the Spanish language.

Notice of the type implented by Article 8280-3.2 is the type provided for in almost all states when personal notice is not required. Examples of some proceedings in Texas whereby notice thereof may be given by publication or posting or both are: 1) the annexation of additional territory by drainage districts or conservation and reclamation districts; Article 8176b, TEX. REV. CIV. STAT. ANN.; 2) Creation of extension of a navigation district; Texas Water Code, Sec. 61.028; 3) Notice of bond elections in Water Control and Improvement Districts is by publication only; Texas Water Code, Sec. 61.034; 4) Cities may annex territory on notice by publication only; Art. 970a, Sec. 6, TEX. REV. CIV. STAT. ANN.; 5) Cities may disannex territory with posting and publication required; Art. 970a, Sec. 10C, TEX. REV. CIV. STAT. ANN.; 6) Creation of Fresh Water Supply Districts; Texas Water Code, Secs. 53.016 to 53.019, inclusive; 7) Exclusion of lands from Fresh Water Supply Districts; Texas Water Code, Sec. 53.233.

The reasons for choosing the method of notice provided in Article 8280-3.2 are manifest. For example, within Hidalgo County Water Control and Improvement District No. 2, Defendant herein, there are some 2,061 property owners owning more than one acre of land in the District. If landowners in excluded areas are entitled to notice, certainly the remaining landowners would be entitled to notice also, as their pro-

perty would be subjected to greater taxes because of the decreased area. There are approximately 2,958 owners of lots in the excluded areas. Personal notice to all landowners in both English and Spanish would mean that some 10,000 notices to over 5,000 owners would have to be sent. A similar problem would confront Defendant District. No. 9.

Plaintiffs complain that insufficiency of notice has deprived them of their right to a hearing. Although the owners of property within the district have no right to be heard on the question of benefits when the boundaries of such district are determined, there is no question that owners of property, under certain circumstances, have a right to a hearing prior to inclusion in a political subdivision. The same would be true as regards exclusions, but regardless, Article 8280-3.2 provides for a hearing and for sufficient notice thereof.

In fixing the boundaries of political subdivisions. "...the legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the dis-

trict, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i.e., the amount of the tax which he is to pay". Falbrook Irrigation District v. Bradley, 164 U.S. 112, 174-175 (1896). See also Chesebro v. Los Angeles County Flood Control District, 306 U.S. 459 (1939). As the aforementioned cases would indicate, Plaintiffs have not suffered and will not suffer a loss of constitutional dimensions, and therefore the quantum of notice to be afforded Plaintiffs will be gauged accordingly. Plaintiffs' reliance on cases such as Mullane v. Central Hanover Bank and Trust, 339 U.S. 306 (1950), Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956) seems misplaced. Each of those cases involved an existing, tangible property interest, as opposed to what seems to be an intangible, future property interest in this case. Notice similar to the notice provided for in Article 8280-3.2, i.e., by publication, has been upheld in cases concerning the formation of water districts. Orr v. Allen, 245 F. 486 (ND Ohio 1917), aff'd 248 U.S. 35 (1918); San Saba County Water Control and Improvement District No. 1, et al. v. Sutton, 12 SW 2d 134 Tex., Comm'n. App. 1929, jdmt. adopted); Tarrant County Water Control & Improvement District No. 1 v. Pollard, 12 SW 2d 137 (Tex., Comm'n. App. 1929, opinion

adopted). See also Rutledge v. State, 7 SW 2d 1071 (Tex. Sup. 1928); Trimmier v. Carlton, 296 SW 1070 (Tex. 1927).

This Court, therefore, holds that the personal notice to landowners of the exclusion of lands from a water control improvement district is not required, and, therefore, that the notice provisions of Article 8280-3.2 are constitutional.

Plaintiffs also attack Article 8280-3.2 as denying them equal protection of law due to the treatment of railroads as a special favored class. The statute provides for notice to railroads to be given by mail, while other landowners were only to be given notice at the courthouse door, by publication, and by posting two copies of the resolution calling the hearing at locations in or near the urban property proposed for exclusion. There is certainly strong justification for providing for special notice to railroads. Railroads run from coast to coast and throughout Texas. Each of some two hundred fifty-four counties in Texas contain numerous political subdivisions, school districts, cities, and other agencies of the State capable of affecting the railroads' interest through taxes or otherwise. For a railroad company covering a large area, the burden of acquainting itself with the activities of a multitude of state agencies would be disproportionate to the trifling inconvenience to a local authority of apprising the railroad by

mail of its impending action. Such a course is only equitable and is not arbitrary or without a compelling state interest.

Defendants have asserted that a three-judge court is necessary to this case, due to Plaintiffs' attack upon the constitutionality of Article 8280-3.2. "The law is clear that even where there is an otherwise proper constitutional-injunctive challenge to a state statute, a three-judge court can be denied if the constitutional question is plainly insubstantial." Murray v. West Baton Rouge Parish School Board, 472 F.2d 438, 441 (CA 5 1973). This Court believes that the constitutional question involving Article 8280-3.2 is insubstantial. A three-judge court is, therefore, not required in this case.

The second case before the Court, Civil Action 72-B-180, was filed against Hidalgo County Water Improvement District No. 2 by Plaintiffs Juan Fonseca, Efren Ramirez, and Miguel Ramirez, all residing within the boundaries of Defendant District. Plaintiffs Fonseca and Efren Ramirez own property within the district; Plaintiff Miguel Ramirez apparently does not. Plaintiffs Juan Fonseca and Efren Ramirez claim that they were denied candidacy in the January, 1973, water district elections in violation of their 14th Amendment rights. Plaintiffs also seek declaratory relief by attacking the constitutionality of Section 51.072 of the Texas Water Code. The suit is brought on behalf of a class, that class being all those persons residing within the cor-

porate territory of Defendant District, who are duly qualified voters under the laws of the State of Texas, and who desire to vote for Plaintiffs Juan Fonseca and Efren Ramirez as candidates for the office of Director of the Defendant District.

At the outset, Plaintiffs' attack on §51.072 must be considered. Section 51.072 provides as follows:

§51.072 Qualifications for Director

To be qualified for election as a director, a person must be a resident of the state, own land subject to taxation in the district, and be at least 21 years of age.

The two recent Supreme Court decisions of Salyer Land Co. v. Tulare Water District, U.S. (No. 71-1456, March 20, 1973), and Associated Enterprises, Inc. and Johnson Fuel Liners v. Toltec Watershed Improvement District, U.S. (No. 71-1069, March 20, 1973), are dispositive of the instant case. It was in these cases that the Court upheld California and Arizona statutes which restricted voting rights in water district elections to landowners within the districts. The reasoning was that such districts were governmental units of special or limited purpose whose activities had such a disproportionate effect on landowners within the districts that nonlandowners might constitutionally be denied voting rights in district elections. Hidalgo County

Water Improvement District No. 2 is a district similar to those in California and Arizona considered by the Supreme Court in the aforementioned decisions. Although Plaintiffs argue that the powers of a Texas Water Control and Improvement District are much more extensive in that it exercises a broader number of powers and its actions affect non-landowning residents, this Court does not believe that the character of a Texas water district can remove it from the scope of Salyer. In view of the recent pronouncements of the Supreme Court concerning water districts, this Court finds that Plaintiffs' attack on Section 51.072 is plainly insubstantial and a three-judge court is unnecessary.

The constitutional issue being foreclosed against Plaintiffs, the Court must now look to the allegations that Plaintiffs Efren Ramirez and Juan Fonseca, although qualified to become candidates in the water district elections, were wrongfully refused when they attempted to place their names on the ballot. Defendants assert that Plaintiffs filed for office too late.

Time for filing in water district elections is governed by §51.075 of the Texas Water Code, which provides:

§51.075 Application to Get on Ballot

A candidate for the office of director or other elective office may

file an application with the secretary of the board to have his name printed on the election ballot. The application must be signed by the applicant or by at least 10 qualified electors of the district and must be filed at least 20 days before the date of the election.

On December 20, 1972, both Plaintiffs Efren Ramirez and Juan Fonseca filed applications for a place on the ballot at the main office of Defendant District. The election was to be held on January 9th, 1973. The general rule in Texas regarding the computation of a period of time is to exclude the first day of a specific period and include the last. 55 Tex. Jur. 2d Time §13 (1964). It may be noted that §51.073 specifically excludes the date of the election. See Murchison v. Darden, 171 SW 2d 220 (Tex. Civ. App. Eastland 1943, writ dism'd). In addition, this Court views the language "at least 20 days" as meaning twenty full days before the date of the election, not portions of a day. See 86 C.J.S. Time §13(5) (1954). The Court recalls from his days as a candidate for the School Board and City Commission that he was required to file the full number of days prior to the date of the election. It being evident that Plaintiffs filed too late for office, they may not prevail in this case. Nothing in this opinion is to be construed as denying landowners within the water district the

right to file in future water district elections as long as the appropriate statutes are complied with.

The foregoing constitutes the Findings of Fact and Conclusions of Law of this Court, and Civil Actions 72-B-171 and 72-B-180 should be, and are hereby dismissed and dropped from the docket of this Court.

The Clerk will send copies of this Memorandum and Order to counsel for the parties.

DONE at Brownsville, Texas, this 15th day of August, 1973.

Reynaldo G. Garza

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

GUADALUPE JIMENEZ, BERNABE	X
ROBLES, ISABEL CERVANTES,	X
MARIO RODRIGUEZ, PABLO	X
ALBISO, ALBINO OVIEDO,	X
ESPERANZA SAENZ, RAMIRO	X
GARCIA, JUAN RAMOS, ERASMO	X
MEDELES, MAGDELENO MONTES,	X
AMELIA MARAMILLO (sic),	X
MARCOS LANDEROS and MARTIN	X
GONZALEZ	X
	X
V.	X Civil Action
	X No. 72-B-171
HIDALGO COUNTY WATER	X
IMPROVEMENT DISTRICT	X
NO. 2, A. E. ELLIOTT,	X
GEORGE HINKLE, E. R.	X
RUSSELL, E. W. GENENWEIN,	X
WILLIAM BUSCH, HIDALGO	X
AND CAMERON COUNTIES WATER	X
CONTROL AND IMP. DISTRICT	X
NO. 9, RALPH POWELL, S. H.	X
TURBERVILLE, KIRK SCHWARZ,	X
B. J. HELLER and TOM	X
SOLEATHER	X

JUDGMENT

The issues in this case have been duly litigated before a properly constituted three-judge court in a hearing held after proper notice, with all the parties hereto by their respective attorneys of record present and participating. After considering the record, the stipulations of the parties, the pleadings, the briefs

and arguments, and all other matters properly before it, the court has concluded that the relief prayed for by the plaintiffs should be denied.

It is therefore decreed that the relief prayed for by any and all of the plaintiffs be, and the same is, denied. It is further decreed that all court costs of this case be taxed jointly and severally against named plaintiffs.

Signed October 2nd, 1975.

THOMAS GIBBS GEE
United States Circuit
Judge

REYNALDO G. GARZA
United States District
Judge

OWEN D. COX
United States District
Judge

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

-----x

GUADALUPE JIMENEZ, et al., :

Plaintiffs :

V. : C. A. NO.

HIDALGO COUNTY WATER : 72-B-171
IMPROVEMENT DISTRICT NO.
2, et al., :

Defendants :

-----x

NOTICE OF APPEAL TO THESUPREME COURT OF THE UNITED STATES

Notice is hereby given that GUADALUPE JIMENEZ, et al., the Plaintiffs above named, hereby appeal to the Supreme Court of the United States from the judgment entered in this action in favor of Defendants on October 2, 1975.

This appeal is taken pursuant to 28 U.S.C. §1253.

David G. Hall

PROOF OF SERVICE

I, David G. Hall, one of the attorneys for GUADALUPE JIMENEZ, et al., Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 17th day of November, 1975, I served copies of the foregoing Notice Of Appeal To The Supreme Court Of The United States on the several parties thereto as follows:

1. On Hidalgo County Water Improvement District No. 2, by mailing three copies in a duly addressed envelope, with postage prepaid, to Mr. Morris Atlas and Mr. Harry Hall, ATLAS, HALL, SCHWARZ, MILLS, GURWITZ & BLAND, P. O. Drawer 1870, McAllen, Texas 78501;

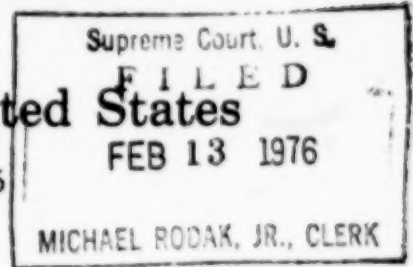
2. On Hidalgo and Cameron Counties Water Control and Improvement District No. 9, by mailing three copies in a duly addressed envelope, with postage prepaid, to Mr. Garland Smith, SMITH, MC ILHERAN, YARBROUGH & GRIFFIN, P. O. Box 416, Weslaco, Texas 78596.

It is further certified that all parties required to be served have been served.

David G. Hall
519 South Texas Avenue
Weslaco, Texas 78596
512/968-9574

Attorney for Appellants

In The
Supreme Court of the United States
OCTOBER TERM, 1975



No. 75-1004

GUADALUPE JIMENEZ, et al.,
Appellants,

vs.

HIDALGO COUNTY WATER IMPROVEMENT
DISTRICT NO. 2, et al.,
Appellees.

ON APPEAL FROM THE THREE-JUDGE PANEL OF THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF TEXAS, BROWNSVILLE DIVISION

MOTION TO DISMISS APPEAL OR, IN THE
ALTERNATIVE, TO AFFIRM JUDGMENT

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In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1004

GUADALUPE JIMENEZ, et al.,
Appellants,

vs.

HIDALGO COUNTY WATER IMPROVEMENT
DISTRICT NO. 2, et al.,
Appellees.

ON APPEAL FROM THE THREE-JUDGE PANEL OF THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF TEXAS, BROWNSVILLE DIVISION

**MOTION TO DISMISS APPEAL OR, IN THE
ALTERNATIVE, TO AFFIRM JUDGMENT**

Pursuant to Rule 16, Paragraphs 1(a) and 1(c),
Revised Rules of this Court, Hidalgo County Water
Improvement District No. 2 and its officers and direc-
tors, Appellees here, move that this appeal be dismissed
or, alternatively, that the judgment of the three-Judge
District Court be affirmed.

QUESTIONS PRESENTED

The Jurisdictional Statement of Appellants (pg. 8)
lists three numbered questions as presented by them
on this appeal as follows:

1. Whether the plaintiffs and the class they represent were denied due process of law in the exclusion of their property from the defendant districts without reasonable and adequate notice of their right to be heard on an issue of substantial and direct interest?
2. Whether the exclusion of plaintiffs' communities from the districts for impermissible political motives denied plaintiffs the equal protection of the law?
3. Whether by singling out railroads as a favored class of landowner entitled to actual notice of a proposed exclusion of realty, Article 8280-3.2, V.A.T.C.S., denied to all other landowners, such as plaintiffs and their class, the equal protection of law?

STATUTE INVOLVED

The statute involved is Art. 8280-3.2, Vernon's Annotated Civil Statutes (J.S. 3). Section 7 of the Article is not included and is as follows:

The fact that urban property, as defined in this Act, unsuitable for irrigation or agricultural purposes, is, or may be, contained within the boundaries of water control and improvement districts engaged principally in supplying water for agricultural irrigation purposes, and that there is no feasible means of excluding such urban property from such districts, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and the same is hereby suspended; and this Act shall take

effect from and after its passage, and it is so enacted.

The statute provides a method by which urban properties as therein defined can be excluded from Water Control and Improvement Districts such as District 2 upon ascertainment of the facts authorizing such exclusion as provided in Section 5 (J.S. 6).

STATEMENT OF THE CASE

On October 28, 1971, the Board of Directors of Hidalgo County Water Improvement District No. 2 ordered the exclusion of thirty-nine "urban properties" as authorized by the statute in question. Appellants admit that the statutory notice was given and the hearing held (J.S. 9). The District Court found that the necessary facts authorizing the exclusions were found by the Board of Directors as a result of the hearing and that such findings are not challenged by Appellants (J.S. pg. 15a, N. 10, pg. 23a).

This suit was filed on December 16, 1972, by various of the Appellants, residing, or owning property, in the urban properties so excluded, in the District Court challenging the exclusion statute on the grounds that the constructive notice provided by the statute denied them due process of law; that they had been denied equal protection of the law as a result of the District Directors allegedly "fencing" them out of the electorate for impermissible political motives, and that the provision of the statute requiring notice by mail to railroad companies denied all other property holders equal protection of the law (J.S. 9). The case was tried on the merits before a three-Judge Court duly convened on July 14, 1975, and the opinion of the Court

and final Judgment was filed on October 2, 1975, denying all relief sought by Appellants on the basis of both the facts and the law and this appeal followed. The opinion of the District Court appears at page 1a of the Appendix, and the Judgment at page 58a of such Appendix.

The facts were stipulated by the parties and the Court found the facts to be as stipulated (App. pg. 4a). Accordingly, it seems that such express finding of facts by the Court, most of which are not contained in the opinion, should be appended to the Jurisdictional Statement (Rule 15 (1)(h)). Appellants have not complied with such requirement. In the complete absence of all the facts upon which the Judgment appealed from was based, it appears that neither error in the Judgment nor the substantial character of the questions posed by Appellants can be properly determined by the Court.

REASONS FOR GRANTING THE MOTION

Only the questions presented are entitled to consideration by this Court and in the context of the case are not only unsubstantial, but have already been decided contrary to the contentions of Appellants.

The reasons given for Appellants' desire to have their properties remain in the district or continue as residents thereof (J.S. pg. 12-14) are immaterial. There is no constitutional right to either municipal water or sewerage facilities as clearly appears from the opinion of this Court in *Lindsey v. Normet*, 92 S.Ct. 862, 974 (1972), where the Court held that there is no constitutional guarantee of access to dwellings of a particular quality and that absent constitutional mandate the assurance of adequate housing and definition of

landlord-tenant relationships are legislative, not judicial functions. Insofar as Appellants' contentions are concerned relative to a layer of invisible governments lacking in accountability to its constituency (J.S. pg. 14-15), District No. 2 is operated by a Board of Directors elected by the qualified electors in annual elections, three being elected in one year and two in alternate years (Texas Water Code, Art. 51.073). Additionally, under the Texas Open Meetings Act (V.A.C.S. Art. 6252-17), which requires a posted agenda from which the Board cannot vary in its meetings (save in rare circumstances), there is full opportunity to ascertain how the Directors are performing their duties and complying with the wishes of the district's electorate. If dissatisfied, the remedy is political, not judicial.

The real issues in this case are not why the owners of excluded urban properties or residents of such properties do not want the properties excluded, but the question of whether the power and authority of the State to regulate and control its own subdivisions and municipalities, was lawfully exercised in this case insofar as District No. 2 is concerned.

Appellants' Contentions Concerning Lack of Due Process Present No Substantial Question

The main thrust of Appellants' whole argument of necessity rests upon the contention that there is a constitutional right to have one's property included in a water control and improvement district and to reside in such a district and the position is then pursued into the argument relative to denial of procedural due process based on constructive, as distinguished from actual personal, notice. The requirements of procedural

due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property and when protected interests are implicated, the right to some kind of prior hearing is paramount but the range of interest protected by procedural due process is not infinite, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). The same rule is announced in *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

The cases cited by Appellants in their attempt to present this case as a voting rights case (J.S. 16) are not persuasive because the decisions of this Court construing such cases in *Gordon v. Lance*, 403 U.S. 1 (1971) and *Hill v. Stone*, 95 S.Ct. 1637 (1975) clearly distinguish such cases from those applicable here. In each of the cases relied on by Appellants, the action complained of involved direct and intentional restrictions and limitations on the exercise of the franchise itself and so resulted in an unconstitutional and discriminatory classification. In *Adams v. City of Colorado Springs*, 308 F.Supp. 1397 (D.C. Colo. 1970), summarily affirmed 399 U.S. 901 (1970), rehearing denied 400 U.S. 855 (1970), the three-Judge Court held that the principles of voting rights cases were not applicable to annexation proceedings and this Court has held that there is no difference between an annexation and exclusion or detachment proceedings. *City of Richmond v. United States*, U.S., 45 Law Ed. 2d 245, 260 (1975).

Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950); *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969); *Goldberg v. Kelly*, 397 U.S.

254 (1970) are inapposite to the instant case. Each of such cases generally involve the type of notice or hearing required by adjudication in judicial proceedings or where the parties held entitled to personal notice would be deprived of a prior existing and ascertainable property right. Furthermore, they generally involve controversies between individuals required to be settled in the ordinary course of judicial proceedings.

This case clearly comes within the concept of notice required by procedural due process as explained by this Court in *Mullane v. Central Hanover Bank and Trust Company*, supra, and *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, et al.*, 367 U.S. 886 (1961). Each of such cases make it clear that the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation and that due process is not a technical conception with a fixed content unrelated to time, place and circumstance, but is compounded of history, reason and the past course of decisions, and any construction of due process which would place impractical or impossible obstacles in the way would not be justified. Accordingly, it is apparent from such decisions that where official action such as here involved is concerned, personal notice is not required and is impractical and impossible. Here over 5000 people would be entitled to personal notice. According to Appellants' own statement (J.S. pg. 12) many owners or residents are migrant farm laborers and if temporarily absent it would be virtually impossible to locate them or give actual personal notice to them. If personal notice should be required, as contended by Appellants, failure of a single party to receive such notice would invalidate an entire official

action or project. The decisions of this Court make it clear that constructive notice of the type provided and given in this case meets all the requirements of procedural due process. Under Appellants' concept of the requirement of personal notice in cases such as this, the States and their political subdivisions would be placed in a constitutional straitjacket and unable to carry out or discharge their legal or discretionary duties or obligations.

Personal notice was not required and under the decisions of this Court no substantial question in this area is presented warranting plenary consideration by the Court.

As to Appellants' Contention That the Exclusion of Their Communities From District No. 2 for Impermissible Political Motives Denied Them the Equal Protection of Law

Appellants' position under this point is based in its entirety on the following statement:

The stipulated evidence and the Appellees' own judicial admissions confirmed the plaintiffs' original suspicions that the exclusion statute was a device created by the Valley water districts for the purpose of fencing the *colonias* out of the districts for the constitutionally impermissible reason that the urban residents constituted a political threat to continued farmer control of the districts. In short, the *colonias* residents have been the victims of an invidiously discriminatory political gerrymander. They have been "fenced out" of the water district electorates because of the defendants' fears of the "political mischief" they might cause (J.S. 22-23).

These Appellees made no such judicial admission and the evidence as stipulated and the facts found by the Court (which are not appended to the Jurisdictional Statement) do not support the contentions of Appellants as to the reasons for the exclusions of the non-irrigable and non-agricultural urban properties and for which owners of residential lots in such properties did not desire irrigation.

The District Court, with the stipulated facts before it, refused to find that the exclusions were effected for the purpose of fencing out Appellants for impermissible political reasons (J.S. pg. 12a, F.N. 5, pg. 22a), and answered Appellants' contention in such respects on a purely hypothetical basis.

Irrespective, however, of the failure of Appellants to discharge their burden of proof as to the alleged reasons for the exclusion of the urban properties, it is clear that both the statute complained of and the action of the Board of Directors of District 2 were not designed to exclude the urban properties because of the alleged political threat of the residents to continued farmer control of the districts. The exclusions were concerned with land and not with people. The facts upon which the right to exclude depended were pursuant to established state policy and dealt with local, economic and state problems where legislatures have historically drawn lines which this Court has respected against the charge of violation of the equal protection clause if the law be "reasonable, not arbitrary * * *" and bears "a rational relationship to a permissible state objective". *Village of Belle Terre v. Boraas*, 416 U.S. 1, 6 (1974); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

In *Dandridge v. Williams*, 397 U.S. 471, 486 (1970), this Court likewise held that the Fourteenth Amend-

ment gives the Federal Court no power to impose upon the States their views as to what constitutes wise economic state policy.

Appellants misconceive the constitutional nature of the right to vote. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) this Court citing *Dunn v. Blumstein*, 405 U.S. 330 (1972), held that the right to vote, per se, is not a constitutionally protected right, and that references to such right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters and that it is not the province of the Federal courts to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. In that case the Court held that education was not among the rights afforded explicit protection under the Federal constitution and applied the legitimate state objective test. In this case the right to have one's property included or remain in, or to be a resident of a water control and improvement district, is not a right afforded explicit or any other type of recognition or protection under the constitution, and the legitimate state objective test is equally applicable.

In *Clark v. Kansas City*, 176 U.S. 114 (1900), a question similar to the one here involved was raised in an annexation case. The Court recognized the distinction between agricultural lands and non-agricultural lands holding that:

"We think the distinction is justified by the principle of the cases we have cited. That principle leaves to the state the adaptation of its laws to its conditions. The growth of the cities is inevitable, in providing for their expansion it may be the

judgment of an agricultural state that they should find a limit in the lands actually used for agriculture. Such use, it could be taken for granted, would only be temporary. Other uses, certainly those to which the plaintiff puts its lands, can receive all the benefits of the growth of a city, and not be moved to submit to the burdens. Besides, such uses or manufacturing uses adjacent to a city may, for its order and health, need control. Affecting it differently from what farming uses do may justify, if not require, their inclusions within the municipal jurisdiction."

The same principles apply to the exclusion of non-agricultural property from irrigation districts.

In Texas, irrigation and agriculture are synonymous. That the promotion of agriculture is a valid public and national purpose is recognized by this Court in *Ivanhoe Irrigation District v. McCracken*, 257 U.S. 275 (1958). The Texas Constitution expressly provides that the irrigation of its arid, semiarid and other lands needing irrigation are public rights and duties and the Legislature shall pass all laws as may be appropriate thereto. V.A.T.C., Art. 16, Sec. 59(a).

Hidalgo County Water Improvement District No. 2 although possibly having slightly more power than did the Tulare Lake Basin Water Storage District considered and described by this Court in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) is still a special purpose district with limited power and low down on the scale or grade of corporate existence as held in *Lower Nueces River Water Supply District v. Cartwright*, 274 S.W.2d 199 (San Antonio Ct. Civ. App., 1954), writ ref., n.r.e.; *Tri-City Fresh Water Supply District No. 2 v. Mann*, 142 S.W.2d 945 (Tex. Sup. 1940); and

Deason, et al. v. Orange County Water Control and Improvement District No. 1, et al., 244 S.W.2d 981 (Tex. Sup. 1952). In *Salzer Land Co.* this Court upheld the right of the Legislature of California in the type of a district there involved to absolutely deny the franchise to certain residents of the district who were otherwise qualified electors, while admitting corporations to vote and even permitting weighting of the votes cast in accordance with the valuation of the properties owned by the voters. Certainly, in the light of this Court's opinion in such case upholding the direct denial of the franchise to certain residents and the weight to be given to the votes of various electors, including corporations, this Court should certainly have no difficulty in sustaining both the statute here involved and the exclusion of the various urban properties pursuant thereto of which the Appellants complain because designed and intended to carry out both the mandate of the Constitution and the policy and judgment of the Legislature in the economic field over which the Courts are without control.

If Appellants are correct in their contentions as applied to the situation in this case, future annexation to or exclusions from municipal and other political subdivisions would be constitutionally impermissible because either of the same would deny the franchise to, or dilute the rights of, some voters.

As to Appellants' Contention of Denial of Equal Protection As the Result of the Statutes Requiring Notice by Mail to Railroad Companies

Section 4 of the Act only requires notice to railroad companies where a portion of their rights-of-way are to be actually excluded from the district. Ap-

pellants do not contend that any such railroad right-of-way was in any manner involved in the exclusion proceedings in question. That the procedure involved local legislative proceedings is unquestioned and notice of such proceedings by publication and posting as provided by the statute clearly met the due process test as heretofore shown. Inasmuch as the constructive notice provided and given satisfied the requirements of procedural due process to Appellants, they are not in a position to complain of the fact that actual notice to railroads was required. That there was strong justification for providing special notice to the railroads appears from the Court's opinion (App. 19a-20a). Likewise, as the Court pointed out (App. 19a) the legislation attacked by Appellants involved neither fundamental rights nor classifications based upon suspect criteria (App. 19a). The classification, if such it was, was clearly a matter for the determination of the legislature. *Crescent Cotton Oil Company v. State of Mississippi*, 257 U.S. 199 (1921); *Hammond Packing Company v. Arkansas*, 212 U.S. 322 (1909); *Baltic Mining Company v. Massachusetts*, 231 U.S. 68 (1913).

In *Lehnhausen v. Lake Shore Auto Parts Co., et al.*, 410 U.S. 356 (1973) the Supreme Court held that the Equal Protection Clause does not mean that a state may not draw lines that treat one class of individuals or entities different from the others and that the test is whether the difference in treatment is an invidious discrimination, citing *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966). That prohibition of the Equal Protection Clause of the Fourteenth Amendment goes no further than invidious discrimination is clearly held in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955); *Morey v.*

Doud, 354 U.S. 457 (1957) and *Ferguson v. Skrupa*, 372 U.S. 726 (1963). The showing that different persons are treated differently is not enough to show denial of equal protection, *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964).

In *State of Washington, ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court of Washington for Spokane County, et al.*, 289 U.S. 361 (1933) the Court held a statute authorizing substituted service on a foreign corporation after withdrawal from state under the circumstances there involved did not deny due process and that the Legislature was entitled to classify corporations and a mere difference in the method of prescribing how substituted service should be accomplished worked no unjust or unequal treatment of the Appellant. In *Dohany v. Rogers*, 281 U.S. 362 (1930), the Court held specifically that the Due Process Clause does not guarantee to the citizen of a state any particular method of state procedure and that "nor does the equal protection clause exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another."

In *Louisville Gas and Electric Company v. Coleman*, 277 U.S. 32 (1928) Mr. Justice Brandeis in his dissenting opinion compiled a long list of cases in which the Court had sustained various classifications in many fields of litigation where the Court had not found a violation of the Equal Protection Clause of the Fourteenth Amendment. Likewise, in *Metropolitan Casualty Insurance Company of New York v. Brownell*, 294 U.S. 580 (1935), the Court held that a statutory discrimination will not be set aside as a denial of equal protection of the laws if any statement of facts reasonably may be conceived to justify it.

Under the previous decisions of this Court, Appellants claim that they were denied due process because of the type of notice required where rights-of-way of railroad companies were involved does not present a substantial question warranting plenary consideration by this Court.

CONCLUSION

In conclusion, it is submitted that in the instant case it indelibly appears that in the exclusions complained of, the decision was based upon the Legislature's determination of the economic interest of the state and compliance with the mandate of the people as contained in Article 16, Section 59(a) of the Constitution (Vernon's Annotated Texas Constitution, Vol. 3) making it a public right and duty to be carried out by the Legislature, in order to irrigate and reclaim lands such as those in District 2, situated in the arid or semiarid portion of Texas, and where irrigation is essential to agriculture.

It is respectfully urged that no substantial question requiring plenary consideration by this Court exists in the clear context of this case and the appeal should be either dismissed or, alternatively, the judgment of the three-Judge District Court affirmed.

Respectfully submitted,

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PROOF OF SERVICE

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Supreme Court, U. S.

FILED

FEB 13 1976

MICHAEL RODRIGUEZ, JR., CLERK

In the Supreme Court of the United States

No. 75-1004

GUADALUPE JIMENEZ, et al.,

Appellants,

vs.

HIDALGO COUNTY WATER IMPROVEMENT

DISTRICT NO. 2, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

**MOTION OF APPELLEE HIDALGO AND CAMERON
COUNTIES WATER CONTROL AND IMPROVE-
MENT DISTRICT NO. 9 (MERCEDDES DISTRICT) TO
DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM
JUDGMENT OF THE THREE JUDGE COURT**

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Explanation of Reference Abbreviations:

1. Stipulations between Hidalgo and Cameron Counties Water Control and Improvement District No. 9 and Plaintiffs will be identified by the prefix MS followed by the stipulation number, (Example MS 1 stipulation numbered 1) and exhibits attached thereto will be identified by prefix MX followed by the exhibit number. Supplemental Stipulation is marked Sup. M plus number.
2. Appellants' Jurisdictional Statement will be referred to by the prefix J.S. followed by the page number.

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<i>Kramer v. Union Free School District</i> , 395 U.S. 621	12
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In the Supreme Court of the United States

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GUADALUPE JIMENEZ, et al.,
Appellants,

vs.

HIDALGO COUNTY WATER IMPROVEMENT
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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

**MOTION OF APPELLEE HIDALGO AND CAMERON
COUNTIES WATER CONTROL AND IMPROVE-
MENT DISTRICT NO. 9 (MERCEDES DISTRICT) TO
DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM
JUDGMENT OF THE THREE JUDGE COURT**

Pursuant to Rule 16, Paragraphs 1(a) and 1(c), Re-
vised Rules of this Court, HIDALGO AND CAMERON
COUNTIES WATER CONTROL AND IMPROVEMENT
DISTRICT NO. 9, its officers and directors, Appellees here,
move the Court to dismiss this appeal, or in the alterna-
tive, to affirm the judgment of the Three Judge District
Court from which this appeal is taken.

QUESTIONS PRESENTED

The Appellants' Jurisdictional Statement on page 8 states the questions as follows:

1. Whether the plaintiffs and the class they represent were denied due process of law in the exclusion of their property from the defendant districts without reasonable and adequate notice of their right to be heard on an issue of substantial and direct interest?
2. Whether the exclusion of plaintiffs' communities from the districts for impermissible political motives denied plaintiffs the equal protection of the law?
3. Whether by singling out railroads as a favored class of landowner entitled to actual notice of a proposed exclusion of realty, Article 8280-3.2, V.A.T.C.S., denied to all other landowners, such as plaintiffs and their class, the equal protection of law?

STATUTE INVOLVED

Texas' Article 8280-3.2 is substantially quoted in Appellants' Judicial Statement, in the opinions of the Three Judge Court, the Fifth Circuit, and the Single Judge District Court. (J.S. p. 3-7, 1a-59a) An omitted Section 7 is supplied by the brief of Appellee, Hidalgo County Water Improvement District No. 2. (p. 2)

The statute is but a projection of a long standing state policy that treats urban and agricultural land differently.

Special purpose districts such as the two Appellee Districts (Hidalgo County Water Improvement District No. 2, hereinafter for brevity called the San Juan District; and Hidalgo and Cameron Counties Water Control and Improvement District No. 9, hereinafter called the Mercedes District) at their organization may include within their boundaries a "town, village, or municipal corporation" (Tex. Water Code, Sec. 51.012) but only if approved by a "majority of the electors in the city, town or municipal corporation" with a "separate voting district" provided for the urban and rural areas. (Tex. Water Code Sec. 51.035) These provisions were enacted in 1925, and were in effect when the Mercedes District was organized. These provisions recognize a potential conflict of interest between urban and agricultural lands. That land and land ownership and supply of irrigation water thereto are the dominant public policy considerations is evident from the constitutional provisions involved (Tex. Const. Art. III, Sec. 52 and Art. XVI, Sec. 59) and the Water Code provision that the petition for creation must be signed by "a majority of the persons who hold title to land in the proposed district which represents a total value of more than 50% of the value of all the land in the proposed district". (Sec. 51.013)

A non-resident owner of land within a district may serve as a director of the district, if elected by qualified electors residing in the district. (Tex. Water Code, Sec. 51.072) The clear intent of declared legislative policy is that these special purpose districts include within their boundaries only the lands that will be directly benefitted by their special services, *here irrigation*, and for the exclusion of lands not directly benefitted.

STATEMENT OF THE CASE

The two Appellee irrigation districts are controlled by the same laws. Their actions in excluding urban subdivisions complied in good faith with Art. 8280-3.2. Decision must turn on whether (1) notice by posting and publication per se denied Appellants notice of their right to be heard; (2) whether impermissible political motives denied Appellants equal protection; or (3) the requirement that railroads be given notice by mail created a favored class.

Repetition will not be here made of the statements of the case as made by Appellants, our co-Appellee, nor of the opinions of the three courts who have passed on the case. (Appellants' J.S. p. 8-12; San Juan District brief, p. 3-4; Three Judge Court, J.S. p. 2a-9a; Fifth Circuit, J.S. p. 24a-33a; Single Judge Court, J.S. p. 37a-39a) It may be helpful to the Court if we extract from the stipulated facts and present in chronological order the exact application by the Board of Directors of the Mercedes District of the public policy of the State as it relates to the distinction or inherent conflict of interest between "urban" and "agricultural" lands.

1. Urban Lands Excluded From Original Boundaries:

The Mercedes District was organized in 1928 and on January 1, 1930, purchased the irrigation system of the American Rio Grande Land and Irrigation Company, which served a gross of 84,833.75 acres within its outer boundaries, which included 5 cities. The original boundaries excluded 2,903.81 acres which composed the cities of Mercedes, Weslaco, Elsa, Edcouch, and LaVilla to whose

treatment plants it continued to furnish raw river water. (MS 9, 7 and MX 1 and 7)

2. Exclusion of Farm Lands Which Became "Urban" As Cities Grew:

The five cities grew out of their original boundaries into the agricultural lands of the District. The District was confronted with the problem of urban lands within its corporate boundaries. Such lands were not being irrigated, and were not benefitting directly from its irrigation purpose. The Texas Legislature recognized the problem in 1949 by the enactment of Article 8280-4. Between 1951 and 1972 the district in 15 separate exclusion orders one to two years apart, excluded a total of 2175.24 acres which had been annexed by the 5 cities within its outer boundaries, under Article 8280-4. (MS 3, 4, 5, 6, 7 and 8c, MX 1, 2 and 6)

3. Exclusion of Farm Lands Which Became "Urban" As a Result of Rural Subdivisions:

The 5 cities in the Mercedes District followed the National pattern in dealing with slums and the threat of slums posed by the mass movement to cities following World War II. They strengthened their subdivision ordinances to require urban developers to pave streets and lay water and sewer lines to serve the subdivision, as a condition of approval. Lack of appropriate land use laws providing similar protection outside city limits left a hiatus in regulation, which invited instant slum developers into the country, and they came. (MS 8h, 19, MX 4, p. 15-17, MX 13) Substantial irrigated farm land was converted to urban use within irrigation districts over the State and no longer used or contemplated use of the irrigation services of the districts. The Legislature again

took cognizance of the problem by passing Article 8280-3.2 here in question.

The Board of Directors of the Mercedes District complied in good faith with the procedures of Article 8280-3.2 and excluded 39 such urban subdivisions by its order of October 17, 1972. (MS 8, 8a, MX 1, MX 4) Notice given was by publication and posting, as provided by the Statute. Personal notice by certified mail was not given. Whatever the efficacy of the two methods of notice, *plaintiffs did in fact receive notice, and were present with their attorney at the public hearing held by the Mercedes District.* (MS 8) Those appearing admitted their land was not being farmed or irrigated but opposed exclusion because they wanted the District to provide them with domestic water and sewer services at a cost they could afford to pay. (MS 8d) Of the 39 urban tracts excluded, only 4 are represented by plaintiffs; all but two are adjacent to existing sources of potable water from a city or rural water supply corporation, or short extensions of such lines will make potable water available; the remaining two will be within range of lines of the Military Highway Rural Water Supply Corporation now under construction. (Sup. M Nos. 2, 3, 4, 5 and 6)

4. Other Concerns Confronting Board:

The plight of plaintiffs with respect to potable water supply did not escape the attention of the Board, and their right to domestic water was preserved in the same way and on the same terms as applied to the 5 cities within the outer boundaries of the district. (MS 8d, e, f, 9, MX 4) Other problems pressed for consideration:

a. *Possible Loss of Water Right for Irrigation of 812.11 acres:* The district held valid title to a water right to irrigate the 812.11 acres of the 39 excluded tracts, which

water right could be forfeited for non-use under Sec. 5.030 of the Texas Water Code. This could be prevented by excluding the urban lands, and transferring the irrigation right to 812.11 acres which would use it. (MS 12, 13)

b. *Districts' Domestic Water Is Limited:* A general water shortage resulted in an adjudication of the water rights of the Mercedes District, along with all diverters from the Rio Grande from Falcon Reservoir to the Gulf. *The State of Texas v. Hidalgo County WC & ID #18, et al.*, 443 SW2d 728. Water for domestic use within the rural areas of the district including the 39 tracts is limited to 4,230 acre feet annually. (MS 10 and 11) The district also holds as trustee title to water for the 5 cities and supplies raw water to their treatment plants. Encouragement of urban growth in rural areas could create a shortage in the districts' domestic supply. (MS 10a)

c. *Directors Were Appellants' Elected Representatives:* The five directors who passed the order of exclusion were elected by qualified voters of the 39 excluded tracts, as well as the remainder of the district. Appellants either participated or were entitled to participate in the elections at which the board members were elected. As such the directors had a responsibility as well to the residents of the 35 tracts who did not after invitation join plaintiffs' suit, and to the residents of the 4 tracts represented by plaintiffs, who wanted their lands excluded. (MS 32, 33)

d. *Potable Water Available at Cost:* Directors had, in addition to their contracts to supply raw water to the treatment plants of the five cities, made contracts with rural water supply corporations to furnish the domestic water allotment of its rural inhabitants to such corporations for treatment and return as potable water to the rural residents of the district through the lines of such

corporations. The directors thus knew that potable water was thus available at cost to all but 2 of said tracts with but slight extension of the supply lines of such cities and rural supply corporations; and the 2 tracts would soon have potable water available through the lines of the Military Highway Rural Water Supply Corporation. It was obvious that the District could accommodate plaintiffs' desires only if it could produce and deliver potable water to the 39 scattered urban tracts at a cost less than the cities and supply companies already in the water treatment business. (MS 24, Sup. M 1, 2, 3, 4, 5)

e. *Financing*: The Mercedes District had just completed a \$10,800,000.00 reclamation project, and was indebted to the United States in that sum. There is a serious question as to whether the bonding capacity of the district would be adequate to duplicate the existing water lines and treatment facilities currently available to plaintiffs, even if it elected to do so. (MS 16, MX 8)

ARGUMENT AND AUTHORITIES

Appellants' Brief will be answered under the headings used in their Jurisdictional Statement:

A. Appellants Were Not Denied Due Process in Exclusion of Their Property Without Reasonable and Adequate Notice of Their Right to Be Heard on an Issue of Substantial and Direct Interest.

The Appellants either voted at the election at which the directors who excluded their land were elected, or were so qualified and entitled to so vote. There is no evidence that an Appellant, or any qualified person was, at such elections or any prior election, denied the franchise. Re-

gardless of how the notice was given, the Appellants had actual notice of the public hearing, appeared, and presented evidence. The evidence presented by Appellants at the hearing supported the findings made by the Board in excluding their urban lands. (MS 8, MX 4) The stipulations and evidence presented in the trial below reveal the existence of no evidence that would justify a finding other than that made by the Board.

Although the facts are agreed, Appellants would change the result by equating this to be a voting rights case, controlled by *Gomillion v. Lightfoot*, 364 U.S. 339, rather than a boundary case controlled by *Hunter v. City of Pittsburgh*, 207 U.S. 161. (J.S. p. 15 to 18) The Three Judge Court correctly observed that it was "boundaries" here involved, and for a permissible constitutional reason, and declined to substitute the word "urban" for "colored" and thereby strike down the legislative power of the states to deal differently between "urban" and "farm" land. (J.S. p. 6a-13a)

Appellants then seek to equate the exclusions to a judicial process, requiring personal notice as in *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 and *Schroeder v. City of New York*, 371 U.S. 208, where property interests and the judicial process were involved, rather than a legislative process to change boundaries of a political subdivision where constructive notice is adequate, as in *Pittsburgh v. Hunter*. The Three Judge Court correctly rejected this contention, citing numerous statutes providing for notice by posting and publication in boundary situations, and pointing out the inconvenience approaching impossibility of giving personal notice in two languages to the entire population and non-resident land owners of such political subdivisions in the boundary situation here involved. (J.S. p. 14a-18a) The Court cor-

rectly observed that appellants' reliance on *Mullane* and *Schroeder* (J.S. p. 18a) is misplaced:

Each of those cases involved an existing, tangible property interest, as opposed to what here seems to be at best an intangible, possible future interest of undetermined nature.

The Court then concluded that the notice provisions of Article 8280-3.2 are constitutional.

B. The Exclusion of Appellants' Communities Was Not for Impermissible Political Motives, and Did Not Deny Appellants Equal Protection of the Law.

Appellants do not ask for a service available to others, but denied to Appellants since these Districts have never provided such services to anyone. They would have the districts duplicate existing water purification plants of the cities and rural supply corporations and lay competing water lines into the 39 urban subdivisions scattered over the 84,659 rural acres of the Mercedes District and the 65,000 acres of the San Juan District. No racial or ethnic issues are here involved and there is no evidence to support such a contention. Rural residents of all racial and ethnic backgrounds have always made their own provisions for drinking and domestic water, which is true nationwide.

Appellants claim they were "fenced out" of the Districts involved for impermissible political reasons. There is no claim of racial discrimination, as was present in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). It has been stipulated that racial discrimination was not the basis for the Districts' actions. In fact, there is no evidence of any motive or design on the part

of Appellee districts other than the exclusion of "urban lands" from the corporate boundaries of the districts to avoid a forfeiture of irrigation rights to the acres excluded, where irrigation had been discontinued, and the transfer of such rights to other lands seeking irrigation services. Appellants still receive untreated water from the districts for domestic use. The argument that the areas in question were excluded because of a fear of how they would vote in the future is mere speculation, and constitutional adjudications cannot be made upon that basis.

This appellee denies any stipulation or judicial admission that appellants' lands were excluded because of such speculation. To reduce appellants' proposal to its ultimate absurdity, the Mercedes District did *arguendo* presume their success to demonstrate the insubstantial nature of appellants' claim. All such speculations were used as an argument indicating the economic and political folly of seeking to acquire domestic water and sewer services at a price below that available through existing sources from a water district which has, from its inception, engaged primarily in irrigation functions, which has no present facilities to engage in such activities, and which, quite probably, does not have the financial capability to construct such facilities even if the directors wished to do so. While such practical realities must be considered by Courts as well as other decision making bodies, there is no evidence that the directors considered anything other than whether the owner of the land did or did not utilize the irrigation services provided by the districts, whether the land was urban in fact, and whether exclusion would be in the best interest of both the urban lands and the district.

An important distinction between the "voting rights" cases and this case is that the former deal with a statute or constitutional provision which operated to selectively

distribute the franchise to one class of residents while denying it to others for political or economic reasons. *Carlington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); *Evans v. Cornman*, 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970); *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *Phoenix v. Kolodziejewski*, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970). In such cases, the challenged statute must be examined to determine whether the exclusions are necessary to promote a compelling state interest. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972).

However the challenged statute in the case does not seek to distribute the franchise but merely provides a statutory means to exclude "urban" property from an agricultural water district. Since the challenged statute does not operate to distribute the franchise to selected classes of potential voters and since there is no evidence of any improper motive, either on the part of the Texas Legislature in passing the statute or on the part of the districts in excluding the "urban" tracts, Appellants have not been unconstitutionally "fenced out" of the WCIDs involved and have not been denied equal protection of the laws.

C. District Court Decision Is Not in Conflict With Applicable Precedents Regarding Notice by Mail to Railroads.

The statute does provide that "notice shall be given to the railroad company by mailing, first class" etc. (J.S. p. 23, 15a) The valid and constitutional basis for this requirement is stated in the opinion of the Single Judge Court (J.S. p. 52a-53a) and the Three Judge Court (J.S.

p. 18a-20a) and further argued in the Brief of the San Juan District, pages 12-14. For brevity, these arguments and authorities are adopted.

CONCLUSION

The Mercedes District has here demonstrated that the act of the District in excluding Appellants' urban lands was a legislative act, wherein notice by posting and publication is adequate; that Appellants' right to keep their urban lands within the irrigation district is not a constitutionally protected right, and no invidious motive prompted the Districts' action; and that provision for personal (by mail) notice to railroads is justified by permissible state interest, and does not deny to Appellants equal protection of the law.

WHEREFORE, this Appellee urges that this appeal should be dismissed, or in the alternative, the judgment of the Three Judge District Court should be affirmed.

Respectfully submitted,

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cers and Directors, Appellees Herein*

PROOF OF SERVICE

I, Garland F. Smith, one of the attorneys for Hidalgo and Cameron Counties Water Control and Improvement District No. 9, its Officers and Directors, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of February, 1976, I served copies of the foregoing Appeal, on the several parties thereto as follows:

1. On Guadalupe Jimenez, et al., Appellants, by mailing three copies to each in a duly addressed envelope, with postage prepaid, to the following:

Mr. David G. Hall
Texas Rural Legal Aid, Inc.
103 East Third Street
Weslaco, Texas 78596

Messrs. Melvin L. Wulf and
Joel M. Gora
American Civil Liberties Union Foundation,
Inc.
22 East 40th Street
New York, New York 10016

Mr. Sanford Jay Rosen
3504 Clay
San Francisco, California 94118

2. On Hidalgo County Water Improvement District No. 2, by mailing three copies in a duly addressed envelope, with postage prepaid, to Mr. Morris Atlas, P. O. Drawer 3725, McAllen, Texas 78501.

It is further certified that all parties required to be served have been served.

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